Supreme Court, U.S.
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No. 01-____

In The

Supreme Court of the United States

BARBRA PIOTROWSKI,

Petitioner,

vs.

CITY OF HOUSTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED

1. Should this Court recognize the "state-created danger" theory, whereby a state-actor is liable under 42 U.S.C. § 1983 for taking affirmative steps that subject a person to injury at the hands of a private actor?

2. If this Court recognizes the "state-created danger" theory of liability, what are the "contours" of that liability?

3. If a city follows a practice of permitting its police officers to "moonlight" for a known criminal and the officers help him commit a crime, is this practice the type of "moving force" that subjects a city to municipal liability under *Monell v. Department of Social Services*?

4. If a city knowingly permits its police officers to moonlight for a dangerous criminal, does this constitute sufficient "deliberate indifference" to subject a city to municipal liability under *Monell v. Department of Social Services*?

5. Do the Seventh Amendment and Federal Rule of Civil Procedure 50 permit an appellate court to overturn a jury verdict by reexamining the evidence under the standard of a "heavy burden" of proof?

LIST OF ALL PARTIES IN THIS PROCEEDING

Barbra Piotrowski
a/k/a Janni Petrovska,
Plaintiff below.

City of Houston, Texas
Defendant below.

Judgment Purchase Corp.
930 Montgomery Street, Suite 500
San Francisco, CA 94133
(owner of a minor portion of the judgment)

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Henderson, *The Background Of The Seventh Amendment*, 80 Harv. L. Rev. 289 (1966) 28

Pruessner, *The Forgotten Foundation Of State Created Danger Claims*, 20 The Review Of Litigation 357 (2001) 20

Pruessner, *Track Records: A Comparison Of Rates Of Reversal Of Jury Verdicts In The Federal Circuits*, Certworthy 13 (Winter 2001) 29

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PETITION FOR A WRIT OF CERTIORARI

Barbra Piotrowski, Plaintiff in the trial court, respectfully petitions as follows for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION OF OPINIONS BELOW

Earlier Opinion (before the trial of this case): *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir.1995).

Opinion to be reviewed: *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. January 17, 2001) (per Justice Jones, joined in by Justice Barksdale, with Justice Dennis dissenting, without opinion). (App. 1)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Opinion on January 17, 2001, reversing a judgment entered against the City of Houston under 42 U.S.C. § 1983. Piotrowski's Suggestion for Rehearing En Banc was denied on March 7, 2001, with the court treating the Suggestion as a petition for rehearing to the panel. (App. 55) This Petition is filed within ninety days of that date, as required by 28 U.S.C. § 2101(c). Sup. Ct. R. 13.3.

The United States Supreme Court has jurisdiction to review the Fifth Circuit Opinion by virtue of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS & FEDERAL CODE PROVISIONS

UNITED STATES CONSTITUTION

Amendment 7:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment 14:

. . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . .

UNITED STATES CODE

42 U.S.C. § 1983
(The codification of the
"Ku Klux Klan Act of 1871")

Sec. 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Jurisdiction And Proceedings In The District Court and the Fifth Circuit Court of Appeals.

This case was originally brought by Barbra Piotrowski against the City of Houston in the United States District Court for the Southern District of Texas under federal question jurisdiction, 28 U.S.C. § 1331. Barbra Piotrowski alleged deprivations of her civil rights and sought redress pursuant to 42 U.S.C. § 1983. The case was initially dismissed under Federal Rule of Civil Procedure 12(b)(6). She timely appealed. Under the jurisdiction of 28 U.S.C. § 1291 the dismissal was reversed by the United States Court of Appeals for the Fifth Circuit, *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cir.1995). (App. 35) The case was remanded to the district court.

The case was then tried before a jury, which rendered a verdict in favor of Barbra Piotrowski and awarded her money damages against the City. The district court denied the City's motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. The district court entered judgment in accordance with the verdict against the City, but deleted some awards of damages. The City timely appealed to the United States Court of Appeals for the Fifth Circuit under the jurisdiction of 28 U.S.C. § 1291. The Fifth Circuit reversed and rendered judgment in favor of the City on January 17, 2001, *Piotrowski v. City of Houston,* 237 F.3d 567 (5th Cir.2001). (App. 1) The Fifth Circuit denied Piotrowski's Suggestion For Rehearing En Banc on March 7, 2001, treating the motion as one for rehearing to the panel. (App. 55)

STATEMENT OF THE FACTS

On October 20, 1980, Petitioner Barbra Piotrowski was shot four times and rendered a paraplegic. (App. 9) To understand how the City's conduct actively created the danger of Piotrowski being shot, it is necessary to trace the origins of the practice whereby the City of Houston regularly permitted its police officers to work ("moonlight") for a high profile criminal, Dudley Bell.

The City Of Houston Followed A Practice Of Permitting Its Police To Moonlight For A Criminal.

In its Opinion, the Fifth Circuit referred to Dudley Bell as "the central figure in Piotrowski's case." (App. 4) Dudley Bell had a long criminal record stretching back to 1956, including arson, wiretapping, and federal perjury. As one police officer testified, even before the shooting, they knew Bell was fully capable of murder. (App. 62)

Despite Bell's long criminal history, the City had effectively put Bell in a position were he could hire the police power of the City. First, Bell formed an extensive network of connections within the City. Bell owned a night club/bar in partnership with the City Fire Chief, Cook. This bar became a regular hang-out for Houston police.

Bell's partnership with a City official had its privileges. Fire Chief Cook stopped Bell from being prosecuted on serious charges, including arson for hire. (App. 4-5 n. 2) The officers who attempted to arrest Bell were told by Chief Cook, after he conferred with the Mayor Louie Welch, that the officers would be fired and lose all their retirement benefits if they did not forget the fact that Bell had anything to do with the arson. The Fire

Chief seized the warrant for Bell's arrest, and the officers ceased any further attempts to oppose Bell.[1]

Unable to "beat him," the officers "joined him." Houston police officers forged an alliance with Bell. Bell's relationships included Fire Chiefs and high ranking police officers within the Houston Police Department ("HPD"), including Police Chiefs. Bell generally "ran in police circles." Despite a long criminal record that should have disqualified him, Bell applied to become a private detective. The City helped him gain this position. HPD officers recommended him to the state licensing agency and Chief of Police, C.M. Lynn, granted Bell police clearance to operate as a private detective in Houston.

With the City's assistance, Bell was successful as a private investigator for the rich and famous of Houston. Police officers and district attorneys regularly worked for Bell in his office on an hourly basis. (App. 24) Bell had a standard rate for hiring police officers to "moonlight" for him as "security guards" or "body guards" for Bell's wealthy clients, including Richard Minns. Two of those moonlighting officers were Charlie Wells and Spider Fincher.

With help from the City, Bell flaunted the law. Bell had a badge that he showed to officers in order to get out of trouble with police. Bell's criminal record shows that he was not arrested, despite involvement in serious crimes, including attempted arson of an occupied bar. One phone call from Fire Chief Cook, and the police released Bell's employee from custody. (App. 59-60)

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[1] See the Memo at App. 57. In conducting its reexamination of the evidence, the Fifth Circuit omits these critical facts that implicated policy makers.

Minns, Bell and the HPD versus Piotrowski.

Barbra Piotrowski once lived with Richard Minns. Minns had made his fortune by founding the chain of President's Health Clubs. In 1980, Piotrowski became pregnant by Minns. Upon learning of the pregnancy, Minns became very angry, threatened her, and pressured her to have an abortion. Instead, on March 17, 1980, she moved out of their apartment, taking much of the property with her. (App. 4)

Minns had hired Bell in the past. When Piotrowski left him, Minns called Bell, which called the HPD into action for Minns. HPD officers immediately came to the scene. Led by Officers Wells and Fincher, these officers accused Piotrowski of "theft" of the property she had taken with her. The officers also trumped up an imaginative arson charge. Supposedly, Piotrowski emptied a commode to allow sewer gases to come into the apartment, where they would explode and kill Minns. (App. 5 n. 3) Only officers who moonlighted for Bell and Minns were allowed to work on these "unusual" charges against Piotrowski, whom they pursued with a vengeance.

Barbra Piotrowski later agreed to meet with Minns at the Guest Quarters Hotel (where he resided) to resolve their differences. When she arrived, Minns summoned police to have her arrested on the arson and theft charges. Minns provided the officers with the warrant, directing them to make the arrest. This was another highly unusual procedure.

After Piotrowski spent the night in jail, Officers Fincher and Wells showed up and pressured her to sign a property settlement agreement with Minns. They just happened to have a copy. The agreement stated that she had never been married to Minns (which was in dispute),

she would make no claims against his property (he was a millionaire), and she would make no paternity claims against Minns (regarding the child she was carrying).[2] (App. 6)

Officer Fincher threatened that, unless she signed the agreement, he would complete her arrest and book her on the trumped up arson and theft charges. She refused to sign. The officers booked her and took her "mug shot." Over twelve years later, she would learn that this police mug shot was ultimately turned over to the assassins who were hired to kill her. (App. 8)

Barbra Piotrowski tried to hide from Minns. She had given Minns back his car, obtained a new car, and moved to a different apartment. One evening (April 18, 1980) she came back to her new apartment. She found Bell, Minns, and Officers Fincher and Wells all waiting for her. Working until 4:30 in the morning, they removed virtually all of the contents of her apartment and loaded them into a waiting moving van. They awarded her property to Minns. (App. 6)

Piotrowski attempted to "go to the police" about Wells and Fincher. (App. 7) She went to Internal Affairs Division ("IAD") and filed complaints about Officers Fincher and Wells. These complaints were made to Sam Nuchia, then head of IAD, who rose to become Chief of Police during this saga. Piotrowski also filed criminal complaints with the police to complain about phone threats made against her and the repeated vandalism of her car.

The evidence indicates that Bell and his moonlighting officers worked hand in glove. For example, at the end of

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[2] She later suffered a miscarriage.

April, 1980, Officer Wells and Bell flew to Piotrowski's mother's house in California. There they showed up, claimed they were "IRS agents," ransacked the house, and took a necklace from around her mother's neck. (App. 7 n. 4) Apparently, Minns claimed he owned this necklace. He paid to have Bell and Wells seize it and return it to him.

Again, Barbra Piotrowski contacted IAD to supplement her complaint about Wells. Sam Nuchia of IAD ultimately replied that there was "no wrongdoing" by police.

At the end of July, 1980, Piotrowski was on her way to her lawyer's office when her car died. Examination revealed a mysterious device that had been installed on the ignition. It looked like a bomb, but turned out to be a "kill-switch." This kill-switch was installed by one assassin, Adrian Franks, hired by Bell and Minns. (App. 8) As Franks testified at trial, his plan was to activate the "kill-switch" (via remote) to stall the car in an isolated spot. Franks would then move in for the kill. Fortunately, the "kill-switch" activated prematurely. The police knew about the discovery of the kill-switch. They apparently informed Bell, who alerted Franks that his kill-switch plan had been foiled. (App. 29 n. 29)

When Piotrowski found the kill-switch, she believed she had tangible evidence that Minns was after her. Officers assured her they would investigate the kill-switch. This caused her to let down her guard. The body-guard she had hired was relegated to a part-time position. She began to resume a normal life, believing the police were now pursuing an investigation against Minns and believing he would not harm her in the face of a police investigation. However, unknown to Piotrowski, this criminal

complaint about the "kill-switch" was secretly diverted to the wrong department, the Burglary And Theft Division where Officers Fincher and Wells worked. (App. 8) The investigation of the kill-switch promptly ended, but Piotrowski did not know that.

Each assassin needed to know how to find Barbra Piotrowski, what car she was driving, and what she looked like. Bell had provided Franks with a "cloak and dagger file" (his term). It included all of this information, along with a "mug shot" of Piotrowski. (App. 8) This mug shot photo could only have come from the police. This photo would identify her for the killing.

Having been alerted by the police that Frank's kill-switch attempt had been thwarted, Bell turned to others. He contacted Rick Waring, another of his regular cronies, about killing Piotrowski. Waring was offended. In fact, Waring wanted to warn Piotrowski, but decided to contact police first. HPD made sure Piotrowski received no advance warning. When Waring went to HPD, he contacted John Liles, one of Bell's many police friends. Waring told Liles all the specifics about the $10,000 contract offer from Bell, because one of Bell's "clients" wanted Piotrowski killed. Liles stopped Waring from warning Piotrowski about the contract on her life. Liles told Waring, "it was in the police hands now [and], **not to warn her.**" (App. 9) That was four weeks before the shooting. If she had been warned, she could have protected herself.

Meanwhile, Bell contacted still another man, Anderson, who arranged for two trigger men to shoot Piotrowski. In the early evening of October 20, 1980, Piotrowski left her apartment and drove to a donut shop. Two men drove up in a car. One man got out. Although

there is no evidence that he had ever seen her before, he recognized his victim, probably from seeing her photo. He pulled a gun from a brown paper bag and fired four shots into her as she tried to duck. She nearly died. She survived and remains a paraplegic. She is confined to a wheelchair. (App. 8-9)

Convicting the actual shooters was easy. Eyewitnesses saw the shooters and they were caught. They confessed, saying they had been hired by "Judge Bell." Soon, *all signs* pointed directly to Bell and Minns. Within two weeks after the shooting, three different witnesses independently told HPD that they had each been offered $10,000 by Bell to kill Piotrowski. Another witness told police that she had overheard Minns saying "he was going to kill Barbra Piotrowski." These leads were discarded. (App. 10)

Soon after the shooting, Dudley Bell's ex-wife came forward with a "smoking gun." It was virtually the written contract for the shooting. It was a note with the dollar figure of $10,000, Barbra Piotrowski's name, address, the type of car she drove, and a list of a few possible guns. Significantly, the note is in Bell's handwriting and on stationery of the Guest Quarters, the hotel where Minns had been staying. (App. 10) Despite this evidence, the investigation did not proceed beyond the gunmen.

Police claimed they were making a full investigation. Piotrowski believed them. However, HPD officers actually "closed ranks" against Piotrowski to protect HPD, Bell, and Minns. They followed a "code of silence." Minns and Bell could monitor the investigation. (App. 10-11) One homicide sergeant admitted at trial that "HPD officers did work for Richard Minns, and Dudley Bell for that matter, and would be willing to tell them anything about

our investigation." The evidence showed that the police continued their cooperation with Bell and Minns, even after the shooting.

Bell was finally convicted, seven years after the shooting. (App. 7 n. 5) This was not because of any HPD initiative. Franks had been arrested by *federal* agents on unrelated credit card crimes. Franks then decided to confess his role in the attempted assassination. The federal agents took Franks to county prosecutors, who then prosecuted Bell. Ultimately, while Bell was convicted of solicitation of capital murder, he spent less than five years in prison. His early release puzzled many. Minns was *never* pursued by the HPD. He was never arrested, interrogated, or subpoenaed. Eventually, Minns moved away to England. (App. 10)

No officers were ever disciplined by the City. At trial, the City stood by its story that the entire Piotrowski investigation had been an "orderly and efficient" investigation. Senior HPD officers who testified refused to criticize Wells or Fincher.

During the trial of this case, City of Houston attorneys received the cooperation of Minns, who sent them materials via his attorney who attended the trial below. The trial judge saw this collaboration with Minns's attorney. Outside the presence of the jury, the judge warned the City attorneys that their cooperation with Minns was probably obvious to the jury. At first, the City attorneys denied any cooperation with Minns. Upon being caught in the act, they admitted receiving materials from Minns, including evidence they attempted to use against Piotrowski. The trial judge ultimately entered an "Order

of Sanctions And Admonishment" finding the City attorneys had "intentionally mislead the Court with respect to its continued contact with Minns. . . . " (App. 47)[3]

In Texas, there is no statute of limitations for solicitation of capital murder. Nonetheless, the Houston Police do not seek to question, indict, or arrest Minns. He remains at large. (App. 10)

Based upon these facts, the jury found the City had pursued a practice (i.e., permitting officers to work for a known criminal) and this constituted a "state-created danger" that injured Piotrowski. The trial court denied a Rule 50 motion for judgment "as a matter of law" and entered judgment on the verdict. The Fifth Circuit found that these facts did not meet the "contours" of the theory of "state-created danger." (App. 31) The Fifth Circuit also reexamined the evidence under the new standard of a "heavy burden that a plaintiff must bear in establishing municipal culpability and causation." (App. 29)

ARGUMENT OF REASONS FOR GRANTING THE WRIT REQUESTED

1. The Court should recognize the "state-created danger" theory of liability, and describe its "contours" in accordance with the legislative intent of Congress in passing the Ku Klux Klan Act of 1871, now codified as 42 U.S.C. § 1983.
2. The Court should reject the Fifth Circuit's attempt to impose a "heavy burden that a plaintiff must bear in establishing municipal culpability and causation," because such a heavy burden is inconsistent with the

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[3] In its reexamination of the evidence, the Fifth Circuit omitted all of these facts.

original legislative intent of Congress, *Monell*, the Seventh Amendment, and Fed.R.Civ.P. 50.

3. Because police moonlighting is a nationwide practice, subject to abuse, the Court should permit cities to incur liability for knowingly permitting their police officers to moonlight for known criminals.
4. The Court should enforce the Seventh Amendment's prohibition against a court "reexamining" the facts found by a jury, particularly on fact intensive issues such as *causation* and *intent*.
5. When the citizens, sitting as a jury, have decided that their government has gone astray by collaborating with criminals to attempt murder, the voice of the people should not be set aside because of a judicially imposed "heavy burden."

The Court Should Recognize The State-Created Danger Theory, And Describe Its "Contours."

State-created danger is a theory of recovery for civil rights violations under 42 U.S.C. § 1983 (liability for deprivation of civil rights). The theory of recovery is used against state-actors, such as police, when they *indirectly* harm people by creating a danger that ultimately injures them. For example, an officer gives a would-be criminal a "green light" that he can commit a crime and not be arrested. With that encouragement, the criminal attacks a person and injures him. *Dwares v. City of New York*, 985 F.2d 94, 96-97 (2d Cir.1993) (recognizing this theory in a case where skinheads attacked protesters after receiving verbal license from police).

The victim has been deprived of the substantive due process right to "bodily integrity," a right recognized in *Rochin v. California*, 342 U.S. 165, 172, 174, 72 S.Ct. 205, 209, 210, 96 L.Ed. 183 (1952). Advocates of the state-created danger theory invariably quote a Seventh Circuit

opinion, *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982), which recognized the theory by reasoning:

> If the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

However, because a *private* actor, such as a criminal, usually causes the ultimate injury in a state-created danger claim, the courts have struggled with imposing liability on the state-actor who played an indirect role.

This Court has never spoken on the state-created danger theory of recovery, a theory on which the circuits are in confusion. The closest the Court has come to speaking on the theory is *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989), where this Court negated governmental liability in the context of private abuse of a child, because the government workers did not have custody of the child, and did not create the danger or increase the danger.[4]

Some circuits have expressly recognized state-created danger, others have not. *All of the circuits* have neglected the legislative intent of 42 U.S.C. § 1983, which was specifically enacted to impose liability because of state-created danger of injury by private actors (i.e., the Klan).

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[4] Some courts read *DeShaney* as an indirect endorsement of the state-created danger theory. See, for examples, *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir.1990) and *Dwares v. City of N.Y.*, 985 F.2d 94, 96-97 (2d Cir.1993). Other courts conclude that *DeShaney* simply "left open the possibility that, under a second set of circumstances, the State could be liable for harm inflicted to an individual by third parties." *Butera v. District of Columbia*, 235 F.3d 637, 648 (D.C. Cir.2001).

Having neglected the fundamental guidance of legislative intent, each circuit has gone its own way. While *every* circuit has spoken on the state-created danger theory of recovery, and many accept it, their descriptions of its contours are contradictory and confusing.[5] The theory is particularly confused in three Circuits: the First, Fourth and Fifth (the court below).

The First Circuit's position reflects the confused status of the theory. The First Circuit *initially* appeared to reject the theory. See *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 991 (1st Cir.1992) and *Souza v. Pina*, 53 F.3d 423 (1st Cir.1995). However, later First Circuit decisions seem unsure about this rejection. In *Soto v. Flores*, 103 F.3d 1056, 1062 (1st Cir.1997), *cert. denied*, 522 U.S. 819 (1997), the First Circuit side-stepped this "difficult question," explaining:

> The history of the state-created danger theory, although recently comprehensively described by the Third Circuit in *Kneipp*, is an uneven one. The distinction between affirmatively rendering citizens more vulnerable to harm and simply failing to protect them has been blurred.

Id. 103 F.3d at 1062. Similarly, in *Rodriguez-Cirilo v. Garcia*, 115 F.3d 50 (1st Cir.1997) the First Circuit again expressed its retreat from certainty, concluding this was a *"nettlesome legal question,"* which they by-passed. *Id.* 115 F.3d at 51 (emphasis added).

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[5] For a listing of the circuits and their "inconsistent elaborations" recognizing the theory, see the very recent decision in *Butera v. District of Columbia*, 235 F.3d 637, 654 (D.C. Cir.2001) (noting "different nexus requirements" and "the lack of clarity in the law of the circuits.")

When the First Circuit observed that "the distinction between affirmatively rendering citizens more vulnerable to harm and simply failing to protect them has been blurred," it was referring to the wide variance among the circuits that recognize state-created danger. Some circuits have liberally imposed state-created danger liability in situations that are quite similar to the facts in *DeShaney*, where this Court negated liability. *DeShaney* held that merely failing to protect a child from abuse does not impose liability, because there is neither a constitutional duty to protect, nor state action. However, several circuits have held that if the police decide not to protect, *and say so*, liability is triggered. For example, in *Dwares v. City of N.Y.*, 985 F.2d 94, 96-97 (2d Cir.1993) the officers' failure to protect flag-burners could not impose liability under *DeShaney*. But, their *announcement* that they would not protect was sufficient to trigger liability. Similarly, in *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir.1990) the failure of the police chief to protect a woman from domestic violence could not trigger liability under *DeShaney*. However, when the police chief directed officers not to protect, liability was then triggered. In these two circuits, state-actors incur no liability from failing to protect. However, they incur liability if they *say* they will not protect. In these two circuits, the *DeShaney* liability line is crossed upon the *de minimus* showing that the harm was "not solely the result of private action." *Dwares*, 985 F.2d at 99; citing and following *Freeman*, 911 F.2d at 54-55. In some circuits, the *DeShaney* line has been blurred by the state-created danger theory.

At the other end of the spectrum, the Tenth Circuit imposes liability under state-created danger only if *six*

discrete elements are met, including proof that the "plaintiff was a member of a limited and specifically definable group." *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir.2001) Because of these sharply varying legal standards for liability, the First Circuit concluded that the theory presents a "nettlesome question." 115 F.3d at 51.

The Fourth Circuit's single published Opinion on the theory is the most critical opinion on the theory, albeit by a divided court. *Pinder v. Johnson*, 54 F.3d 1169, 1175-76, 1179-82 (4th Cir.1995) (en banc). *Pinder* is often cited and was cited by the Fifth Circuit in this case. (App. 27)

In *Pinder*, an officer falsely assured a woman that a criminal who had repeatedly attacked her family would be held overnight in jail. She then returned to work. The attacker was then released and he quickly carried out his original threat by killing her children.

When the woman sued the officer for "state-created danger," the Fourth Circuit, in a divided En Banc Opinion, barred the action. While some justices wrote a dissent that "state-created danger" law was "clearly established," the majority declared the law unclear. Because the officer was not violating "clearly established law," he enjoyed immunity. The majority opinion criticized the theory as a "slippery slope" of municipal liability. The *Pinder* opinion splinters into concurrences (which label the criticism *dicta*) and dissents. *Pinder* heightened the level of ambiguity and confusion surrounding state-created danger.

Pinder demonstrates how the "unclear" state of the law leads to a strange result. In some circuits, the victim cannot sue the police officer who created the danger. The officer himself enjoys immunity, because the law is not "clearly established." *See*, for examples, *Greer v. Shoop*,

141 F.3d 824 (8th Cir.1998) and *Butera v. District of Columbia*, 235 F.3d 637, 654 (D.C. Cir.2001). Thus, Piotrowski could not have sued Officers Wells, Fincher, or Liles, individually, because they enjoyed immunity. Individual officers only lose their qualified immunity when they violate "clearly established" law. *United States v. Lanier*, 520 U.S. 259, 267-269, 117 S.Ct. 1219, 1228, 137 L.Ed.2d 432 (1997) and *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Thus, even in some circuits that recognize the "unclear" state of the law, a plaintiff seeking redress under § 1983 can only sue the governmental entity, not the individual officers who actually put the plaintiff in harms' way.[6]

Citing *Pinder*, and other cases, the Fifth Circuit has now issued an Opinion carefully cloaked in the legal ambiguity surrounding state-created danger: that this case supposedly fails to meet the "contours" of the theory, if such a theory even exists, and it may not. (App. 31)

Of all the circuits, the Fifth Circuit has been the most guarded about its position. In five different cases scattered over a decade, the Fifth Circuit has taken the ambivalent position that it need not recognize the theory, because every case it has seen fails to meet its "contours" for the theory. Thus, the Fifth Circuit has described the "contours" for a theory that it has never recognized. *Salas v. Carpenter*, 980 F.2d 299, 311 (5th Cir.1992); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 531-32 (5th Cir.1994); *Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir.1997);

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[6] The circuits even disagree on whether the law is "unclear" with some holding that it is clear, so officers enjoy no immunity. *Monfils v. Taylor*, 165 F.3d 511 (7th Cir.1998) and *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir.2001).

Saenz v. Heldenfels Bros., Inc., 183 F.3d 389 (5th Cir.1999) ("this court again refused to adopt a state-created danger theory"); and now the case at bar, *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir.2001) ("Although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory.") (App. 31)

The Fifth Circuit's latest "contours" are impossible to meet, because they embrace a "Catch 22" requirement.[7] If a plaintiff successfully proves *mental culpability* under the Fifth Circuit's new standards, then the plaintiff negates the *causation* requirement for state-created danger, and vice versa. The Fifth Circuit Opinion, read *in toto*, poses a loaded question to a plaintiff: did the state-actor act in the face of an *existing* danger? The plaintiff can answer "yes" or "no," but she loses either way. If she answers "yes, the situation was already dangerous," then there is no liability for state-created danger, because the danger already existed.[8] If the plaintiff answers "no, the situation was only *potentially* dangerous depending on how it was handled," then the state-actor could not have been "deliberately indifferent" to an impending danger. The court holds that the state-actor must be on notice of an

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[7] "Catch 22" refers to a rule that effectively has no meaning, because a contradictory corollary (the "catch") will always negate the original rule. See Joseph Heller, *Catch-22* 46 (1961).

[8] The Fifth Circuit quotes *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 n. 7 (10th Cir.1998) in reasoning "the state would not be liable because it could not have created a danger that already existed." (App. 31-32)

existing dangerous condition in order to act with sufficient "deliberate indifference," so there is no mental culpability for § 1983 liability .[9]

These Catch 22 "contours" for state-created danger are wholly inconsistent with the original legislative intent behind 42 U.S.C. § 1983. In describing the "contours" of state-created danger theory, the Fifth Circuit, and *all* of the other circuits, wholly neglect the legislative history of the statute. *See*, Pruessner, *The Forgotten Foundation Of State Created Danger Claims*, The Review Of Litigation, Vol. 20, April 2001.

The Forgotten Foundation Of State-Created Danger

The statute now known as 42 U.S.C. § 1983 began life as the Ku Klux Klan Act of 1871. In *Monell v. Department of Social Services*, 436 U.S. 658, 665-690, 98 S.Ct. 2018, 2023-2035, 56 L.Ed.2d 611 (1978), the Court returned to this legislative history as the touchstone for determining the contours of § 1983. As the Court remembered, the Act was passed after Congress reviewed a voluminous report

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[9] Thus, according to the Opinion below, as a matter of law, *mental culpability* is now missing. The Fifth Circuit reasoned that Bell did not present an imminent danger, because "none of Dudley Bell's previous misdeeds were contract killings." (App. 25) The fact that the police had once arrested Bell for attempting to set fire to a bar (by using a keg of black powder) while the owner was still inside would seem to infer that Bell was a dangerous character. (App. 59-61) This type of conduct might explain why Officer Liles fully admitted that he knew, prior to the shooting, that Bell was capable of murder. (App. 62) The Fifth Circuit does not discuss this evidence, preferring its own conclusion that it was unforeseeable that Bell might commit violent crime, so culpability was supposedly missing. (App. 25)

that detailed malicious conduct by private actors, members of the Klan.

If the Klan had only been a group of private actors, its suppression would not have required federal intervention. However, in reviewing the report, it became apparent that the Klan was aided and protected by local officials, who granted Klan members virtual "immunity" from prosecution. This Court explained in *Monroe v. Pape*, 365 U.S. 167, 175, 81 S.Ct. 473, 477, 5 L.Ed.2d 492 (1961) (quoting Representative Lowe), that the problem was complicity:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime. . . .

Of course, no one was claiming that the local police "created" the Klan. Rather, local officials and police were causing people "to be subjected" to Klan violence. Ignoring the legislative history of § 1983, the Fifth Circuit now requires a showing that the state-actors *created* the danger in order to trigger liability under 42 U.S.C. § 1983. (App. 31-32) This new "contour" developed by the Fifth Circuit contradicts not only the original legislative intent, but also the clear wording of the statute. The statute imposes liability if the state actor causes someone "to be subjected" to a deprivation. 42 U.S.C § 1983. The statute simply does not require a showing that the state-actors *created* a new danger.

Monell also holds that this statute is to be *broadly construed* to redress violations of civil rights. *Monell*, 436 U.S. at 683, 98 S.Ct. at 2032. Indeed, *Monell* quotes Representative Shellabarger for the proposition that anything other than a liberal application of a law meant to preserve liberty would be "monstrous." *Id.* This mandate for broad liability is now contradicted by the Fifth Circuit's imposition of "rigorous requirements," a "high threshold of proof," and a "heavy burden" for municipal liability. (App. 21, 29)

The circuits should be directed to recognize state-created danger liability, and instructed to describe its "contours" consistent with the legislative history of the Ku Klux Klan Act of 1871.[10] Applying this legislative intent analogy, the Catch 22 analysis of the Fifth Circuit disappears. If the Ku Klux Klan took actions similar to the actions that Bell took against Piotrowski, and if local police had assisted the Klan to the extent to which the HPD assisted Bell, does anyone really doubt that either *causation* or *culpability* would be missing?

Fortunately, the danger of the Klan has largely passed. However, new groups of organized criminals now present a much larger threat. They are bound together by a common interest: money. And money is the motivating force behind moonlighting.

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[10] Since the vast majority of state-created danger cases end with "cert. denied," it appears this Court has previously declined multiple invitations to speak on state-created danger. Piotrowski submits that, now that all of the circuits have issued pronouncements on the theory, this Court should now speak on which circuit's contours are correct.

Police Moonlighting: A Nationwide Phenomena In Which Police Occasionally Work For The Criminals.

In the court below, numerous cities across the country filed Amicus Briefs in this case. These cities apparently fear liability, if liability is found in this case. *See, Cities Fear Suits If Court Recognizes State-Created Dangers,* The Texas Lawyer, Dec. 13, 1999, p. 1.

Most cities allow their police to moonlight. The cities can pay their police less, knowing that the officers can often double their salaries via moonlighting. Police can earn far more via moonlighting for private parties than they can earn serving the public.[11] Thus, police moonlighting has become a nationwide phenomena.[12] When cities allow their police to moonlight (particularly "in uniform"), the police power is effectively hired by a private employer.

Unfortunately, moonlighting officers sometimes end up working for criminals they are supposed to be investigating. For example, in Memphis, Tennessee when police raided drug dealers' warehouses, they found officers from their own SWAT team standing guard. (*The Commercial Appeal,* Memphis, Tennessee, January 22, 1998, p. A16, *"Concern Grows Over Officer's Second Jobs,"* 1998 WL

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[11] For example, in Denver (one *amici* below), a moonlighting officer can add more than $40,000 to his annual salary. (*Denver Post,* Nov. 18, 1998, p. B10) (Editorial) 1998 West Law 18531156).

[12] Many major cities face heavy police moonlighting, including **Philadelphia,** *Philadelphia Inquirer,* Feb. 4, 1987, p. G6, "Attorneys To Discuss Ban On Police Moonlighting"; **Detroit,** *Detroit Free Press,* November 29, 2000, p. 1B, "Police In Line For Work Off-Duty"; and **Boston,** *Boston Globe,* October 1, 2000, p. 1A, "Cases Lost When Cops Put Paid Details First."

3660949). In Boston, a moonlighting officer was paid $20,000 over four years "to keep an eye on things" at a strip-club where cocaine was sold. *Boston Globe*, October 13, 1998, p. B6, "Peabody Strip Club Ex-Owner Tells Court He Paid Off Police For Years." In Philadelphia, an officer had a lucrative moonlighting job working with money launderers. *Philadelphia Inquirer*, September 2, 1998, p. B1, "Officer Indicted In Drug Case." In Cleveland, FBI undercover agents conducted a sting operation by hiring moonlighting officers to unload a plane full of drugs. More than forty local officers were arrested for accepting the moonlighting job.[13]

Moonlighting for criminals creates a danger that criminals will be encouraged to commit criminal acts with police power. For example, in New Orleans, a police officer moonlighting as a "security guard" for a drug lord picked up a rival dealer in the squad car and delivered the man to the drug lord. The man's body was later found in the Mississippi woods.[14]

Cities' attempts to curb moonlighting have met with resistance from police, who enjoy the high pay that comes with working for questionable businesses. Even after a homicide by two moonlighting officers in Denver, the Denver police union adamantly resisted city restrictions on moonlighting. *See, Denver Post*, November 18, 1998 edition, p. B10; (Editorial) 1998 WL 18531156 and December 19, 1996 edition, p. B1, "Moonlighting Limits For

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[13] "Moonlighting For The Mob," ABC News, 20/20 May 12, 1999 edition. Transcript # 1960 from Federal Document Clearing House, Inc., Landover, Md.

[14] February 4, 1998, edition of "Morning Edition" available from Federal Document Clearing House, also available on WestLaw at 1998 WL 3306256.

Police Draw Criticism," 1996 WL 12639374. Officers in the Houston area have likewise chaffed at similar restrictions. *The Houston Chronicle*, Sept. 6, 1985, Sec. 2, p. 11, "Pasadena Officers Want Ban On Off-Duty Jobs Ended."

The Fifth Circuit's Opinion, below, represents the *only major precedent* discussing municipal liability for errant moonlighting. Unfortunately, it allays the cities' fear of liability, because even the egregious misconduct here does not meet the Fifth Circuit's "heavy burden that a plaintiff must bear in establishing municipal culpability and causation." (App. 29)

The Fifth Circuit Violated The Seventh Amendment And Misused Federal Rule 50 By Reexamining The Evidence Under A "Heavy Burden" Requirement.

The Opinion below does not discuss the Seventh Amendment, and that is the problem. As members of this Court have observed, the Seventh Amendment prohibition against reexamination suffers, not from outright opposition, but from erosion due to *sub silentio* neglect. The Seventh Amendment has rarely been shaped by pronouncements of this Court, which have been few. This Court's recent decisions addressing the Seventh Amendment have been limited to examinations of jury awards of damages, not reexamining the factual determinations supporting liability. See, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, ___ U.S. ___, 121 S.Ct. 1678 (2001).

In *Gasperini*, both the majority opinion and the dissents recognized that the Seventh Amendment's reexamination clause has effectively been shaped, not by pronouncements of this Court, but by the *practices* of the

courts of appeals in reversing jury verdicts. While this Court was "reserving questions" about the reexamination clause for thirty years, the circuits were busy reversing certain types of jury verdicts. *Id.* 518 U.S. at 417, 442, and 448. This history makes it extremely important that this Court stop the *sub silentio* erosion of the Seventh Amendment.

The Fifth Circuit reversed this case because the court reached its own decision on subjects that have historically been the province of the jury: *causation* and *intent*. (App. 29) Space will not permit the analysis of the many *de novo* factual conclusions reached by the Fifth Circuit. Much of the court's independent analysis of Piotrowski's evidence is buried in footnote 29 of the Opinion. (App. 29) However, a review of the court's central factual conclusion will demonstrate that the court simply re-decided this case. The court said in its Opinion (App. 27):

> Finally, Piotrowski charged that City policy extended even to the unthinkable – its affirmative assistance of Bell's carrying out a murder contract on her life. . . . There is no evidence, however, that any action of any individual City employee, much less official custom or policy of the City, so assisted Bell.

Actually, there is abundant evidence that City employees assisted Bell in attempting murder. City police provided Bell the "mug shot" of Piotrowski so that assassins could identify her, warned Bell that his "kill-switch" had been discovered (so that he could wave off Franks and change plans), and even stopped Waring from warning Piotrowski that Bell was putting out a contract on her life. After the shooting, the police effectively protected Bell and Minns from prosecution. Of course, their misconduct *after* the fact did not cause the shooting and is

not itself actionable. However, when there is evidence that police go to great lengths to "close ranks" (their own words) against a shooting victim to protect, Bell, Minns, and themselves, a jury is allowed to infer complicity *prior* to the shooting. This is a routine factual inference. The fact that the City *never* disciplined the officers involved and then cooperated with Minns during the trial confirms this inference of prior complicity. The Fifth Circuit refuses to consider such an inference, apparently concluding it is "unthinkable" for a City to be involved in murder.

Of course, to impose liability on the City under *Monell*, these individuals' actions that assisted Bell must be caused by a City "custom, policy or practice." *Monell, supra*, 436 U.S. at 694, 98 S.Ct. at 2037. Significantly, the Fifth Circuit found that Piotrowski proved a widespread City "practice" of permitting police to moonlight for a known criminal, Dudley Bell. (App. 24)

The central question of this case is now in focus: **did the individual officers assist Bell because Bell regularly hired Houston police officers to moonlight for him?** A skeptic might infer that officers decided to assist a criminal, but this had *nothing* to do with the fact that the criminal regularly hired them. A more rational conclusion is that the *reason* the officers assisted Bell was because Bell regularly hired these officers with the full blessings of City officials. The Fifth Circuit refuses even to discuss this inference.

The Fifth Circuit even re-decided the culpability and causation issues for individual officers. Officer Liles has long been blamed for his stopping Waring from warning Piotrowski about the contract on her life. Liles's conduct is particularly suspicious, because Liles had long been

involved with Bell. (App. 9-10) Other Officers, including Sergeant Williamson, testified that Liles lied about key facts in order to cover up his involvement with Bell. But, the Fifth Circuit disagrees and vindicates Liles with the conclusion that he was "no pawn of an allegedly corrupt police department." It therefore rejected liability based upon Liles stopping the Waring warning. (App. 29 n. 29) The Fifth Circuit refuses even to discuss the inference that Liles *was* a pawn of a corrupt police department, and therefore stopped Waring from warning Piotrowski.

In refusing to consider these inferences, the Fifth Circuit violates the Seventh Amendment. The Seventh Amendment prohibits a court from reexamining facts found by a jury, except in accordance with the rules of common law. Under the common law, jury verdicts could be set aside only if the party opposing the verdict could concede all of the evidence that supported the verdict, and the inferences to be drawn in favor of the verdict, and still prevail. *See*, Henderson, *The Background Of The Seventh Amendment*, 80 Harv. L. Rev. 289 (1966) (cited in *Gasperini*).

In its Opinion below, the Fifth Circuit ignored this Court's guidelines for reviewing evidence on appeal of a denial of a Rule 50 motion, as set forth in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). *Reeves* is not even cited. This is particularly surprising, because in *Reeves* this Court reversed a panel of the Fifth Circuit (which panel included Justice Jones, author of the Opinion below) for failing to follow the correct standard of review before disregarding a jury verdict under Rule 50. This Court

found that "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." 530 U.S. at 153, 120 S.Ct. at 2111.

Here, on *one issue*, limitations, the Fifth Circuit applied the correct standard of review. (App. 12 n. 9) The court correctly weighed the conflicting inferences that might be drawn on the factual issues relevant to limitations, and deferred to the jury's finding. (App. 15) However, the Opinion below fails to apply *Reeves*, or any deferential standard of review, when it turns to evidence on *causation* and *intent*, two fact-intensive issues. (App. 21, 29)

Reeves requires that the appellate court draw all reasonable inferences in favor of the verdict. The standards set forth in *Reeves* were ignored in favor of the "heavy burden," "high threshold of proof," and "rigorous requirements" standards that the Fifth Circuit now imposes for municipal liability. App. 21, 29. No other circuit imposes such standards.[15] This new standard is inconsistent with *Monell*, the case cited in support of this standard, for *Monell* held that § 1983 is to be "liberally and beneficently construed" to provide remedies for civil rights violations. *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 868, 112 L.Ed.2d 969 (1991) (quoting *Monell*, 436 U.S. at 683). Indeed, other circuits, such as the Tenth Circuit in *Bertot v. School District No. 1*, 613 F.2d 245 (10th Cir.1979), read *Monell* and conclude, "The spirit of *Monell* is more compatible with an expansion than a contraction of liability." *Id.* at 251. *Monell* simply cannot be invoked

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[15] As a general rule, the Fifth Circuit reverses far more jury verdicts involving personal injuries than does any other circuit. See the study by the under-signed counsel, Pruessner, *Track Records: A Comparison Of Rates Of Reversal Of Jury Verdicts In The Federal Circuits*, Certworthy 13 (Winter 2001).

as the justification for a court of appeals broadly reexamining the facts in violation of the Seventh Amendment.

Piotrowski's constitutional rights have been violated twice. The jury recognized the original deprivation by the City, and decided the facts in her favor. Her rights were vindicated. Then a separate constitutional violation occurred. The Court of Appeals violated the Seventh Amendment prohibition against independently reexamining the evidence and thereby replacing trial by jury. Piotrowski requests that this Court rectify this second violation of her constitutional rights.

This Court should recall that, although this is a civil case, it is a case of an individual trying to protect herself from a gross abuse of police power. The "People" (the jury) have attempted to check this abuse of police power by imposing liability on the governmental entity. When the People have so spoken, the courts should not reverse their decision because the judiciary has decided to protect the governmental entity behind a "heavy burden" in derogation of the liberties preserved in the Seventh Amendment.

CONCLUSION

For the reasons stated herein, Petitioner Barbra Piotrowski requests this Honorable Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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United States Court of Appeals,
Fifth Circuit.

Barbra PIOTROWSKI,
Plaintiff-Appellee-Cross-Appellant,

v.

CITY OF HOUSTON, et al., Defendants,
City of Houston, Defendant-Appellant-Cross-Appellee.

No. 98-21032.

Jan. 17, 2001.

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Appeals from the United States District Court for the Southern District of Texas.

Before JONES, BARKSDALE and DENNIS, Circuit Judges.[1]

EDITH H. JONES, Circuit Judge:

Barbra Piotrowski ("Piotrowski") sued the City of Houston ("City") for constitutional violations arising from its failure to prevent her wealthy former boyfriend from attempting to kill her. Implicated in the boyfriend's plot was an unsavory private investigator who had cultivated police and political friendships and regularly hired off-duty officers to work for him and the boyfriend. In exchange for the detective's favors, officials in the Houston Police Department allegedly covered up his and their coworkers' misdeeds. Piotrowski persuaded a jury

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[1] Judge Dennis dissents, reserving the right to file a dissenting opinion at a later date.

that the City is liable for her shooting, and she was awarded a judgment of over $20 million. The City has appealed on numerous grounds. This court finds that despite the misconduct of several City employees, the evidence does not support municipal liability or liability based on a state-created danger theory. Additionally, the statute of limitations ran on Piotrowski's equal protection claim. We reverse and render judgment in favor of the City.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a disturbing case – both in terms of what happened to Piotrowski and how members of the Houston Police Department ("HPD") conducted themselves before and after the shooting. Piotrowski was shot and rendered a paraplegic by a hit man procured by her ex-boyfriend, Richard Minns. The evidence connected members of the Houston police and fire departments to Minns and his hired investigator Dudley Bell in acts that harassed and threatened Piotrowski before the shooting.

Piotrowski first met Minns while on a ski trip in Aspen, Colorado during the winter of 1976. She was then a twenty-three year old nursing student from California; Minns was a forty-six year old married Texas multi-millionaire, and was the founder of President and First Lady Health Clubs. Minns was in the process of divorcing his first wife. In the spring of 1977, Minns persuaded Piotrowski to move to Houston, and the two began living together. During this period, Piotrowski worked as a business consultant and model for Minns's health clubs.

During the roughly three years they lived together, their relationship deteriorated. According to Piotrowski, Minns started attending wild parties and taking drugs. He became increasingly violent toward her, physically abusing her on at least two occasions. One of his blows broke her nose and hand. In March 1980, the relationship ended. Piotrowski had become pregnant. Minns, during an argument, began to push her and told her to have an abortion or move out. Piotrowski packed up her belongings and left Minns's Houston apartment.

Minns continued to harass Piotrowski after she left him. The harassment took a variety of forms – threatening Piotrowski and her family, filing frivolous charges against her, vandalizing her property as well as her attorney's office, and even placing a stalling device on her car. But what makes this domestic dispute especially unusual is that Minns used the services of at least two members of the HPD as well as one member of the Houston Fire Department to harass Piotrowski.

Initially, Minns contacted Mickey Brown, a member of the Houston Arson Department who also taught boxing to Minns's children, to concoct an arson charge against Piotrowski. Brown, in turn, contacted Detective "Spider" Fincher of the HPD to discuss possible theft charges against Piotrowski. Fincher worked off duty for Dudley Bell, the central figure in Piotrowski's case. Bell was a private investigator with his own criminal record.[2] Bell arranged the murder contract on Piotrowski.

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[2] Bell's criminal history included charges and/or convictions for arson, wiretapping, federal perjury, and bribing a police officer to mis-file the criminal records of one of Bell's clients. In 1972, Bell owned a night club with the then-Chief of

Fincher telephoned Piotrowski and told her she would be arrested for arson and for felony grand theft (relating to items Piotrowski took with her upon leaving Minns's apartment) unless she signed a document releasing Minns from all common law marriage and paternity claims. Brown threatened her with the arson charge if she did not sign such an agreement.[3]

Piotrowski tried to reach a settlement with Minns. But instead of waiting for her to review a proposed agreement, Minns and Bell, with help from their contacts at the HPD, decided to put more pressure on Piotrowski. Minns invited Piotrowski to meet at his hotel so that the two could work out their differences. Piotrowski agreed. Once at the hotel, though, Minns summoned the police to arrest Piotrowski on the theft charges – based on an arrest warrant that *Minns* had in his possession. Minns invited the officers at the scene to contact Fincher and HPD Detective Charles Wells, who also worked part-time for Bell, if the officers doubted the warrant's authenticity. Given the unique circumstance that the complainant possessed the warrant, the surprised officers accepted Minns's offer. After receiving assurances of authenticity

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the Fire Department. When the club burned down, the Fire Chief allegedly had arson charges against Bell dismissed. Bell was also known to have other friends in the HPD as well as in Houston politics.

[3] Brown allegedly claimed that Piotrowski had tried to blow Minns up by exposing electrical wires in their apartment and (somehow) rigging a toilet such that methane and other gases would build up in the home. When Minns turned on the lights, the gases would ignite, killing Minns.

from either Fincher or Wells, on duty at HPD, the officers arrested Piotrowski.

Piotrowski was interrogated at an HPD station by Fincher and Wells, who produced the settlement agreement and told her that she could avoid theft charges by signing it. She refused. As a result, she was fingerprinted, photographed and forced to spend time in jail before being released.

Shortly after being released, Piotrowski was returning to her apartment from a friend's birthday party. Upon arriving at her residence, she became alarmed that Minns, Bell, Fincher, and Wells (among others) were gathered outside. Piotrowski attempted to call her lawyer from a public phone. Officer Wells prevented her from completing the call and escorted her to her apartment, which he and Fincher and Minns then searched. Minns directed the men to remove various items that he claimed were his. Although Wells and Fincher implied that they had a search warrant, Piotrowski never saw it. Bell remained in the parking lot during the search and allegedly vandalized and slashed the tires on the cars of Piotrowski and her attorney.

Toward the end of April 1980, Piotrowski filed a formal complaint with HPD's Internal Affairs Division ("IAD") about the conduct of Fincher and Wells.[4] In fact,

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[4] During this time, Minns and his associates also harassed Piotrowski's family. Minns and Brown contacted Piotrowski's father, telling him that his daughter might go to prison if he did not convince her to work things out with Minns. A business partner of Minns told Piotrowski's father that she would get

Piotrowski and her family filed several complaints with the HPD about the conduct of Minns, Bell, Fincher, and Wells in the months after she moved out of Minns's apartment. The complaints identified those men as the perpetrators of harassment and intimidation, and Piotrowski stated that Minns had threatened her life on several occasions. The HPD informed Piotrowski that they had investigated the various charges and found no wrongdoing by the police officers. Thus, despite her protests, no action was taken to stop the harassment or to discipline Fincher and Wells.

In May the office of Piotrowski's attorney was burglarized and set on fire. Files pertaining to Piotrowski's case were removed. At about this time, Minns directed Bell to rent an apartment below Piotrowski's in order to keep track of her. From this apartment, Adrian Franks, who worked for Bell, tapped Piotrowski's phone and recorded her calls.[5] As Franks also monitored

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$20,000 if the father would convince his daughter to leave Texas. On another occasion, Bell and Wells traveled to California and searched the home of Piotrowski's parents, apparently without a warrant. Posing as IRS agents, they detained Piotrowski's mother and her guests, searched the house for property belonging to Minns, and even took a necklace off of the mother's neck. Piotrowski's parents filed IAD complaints following these events. No action was taken against Wells, and the necklace was never recovered.

[5] Franks began cooperating with the police in 1984 and his testimony helped to convict Bell of solicitation of capital murder for the attempt on Piotrowski, for which Bell was sentenced to 38 years in prison. Franks also confessed to burglarizing the office of Piotrowski's lawyer but denied starting a fire in that building. Franks was never charged with any offense related to Piotrowski's harassment.

Piotrowski's comings and goings, he knew what she looked like and what car she drove. While Franks was spying on Piotrowski, Bell offered him $10,000 to kill her. Franks agreed. Bell supplied Franks with a packet of information on Piotrowski which included a police-style mug shot of her that could have been taken when she was interrogated by Fincher and Wells.

Franks installed a kill switch on Piotrowski's car in July.[6] Fortunately, the device did not function properly. Piotrowski's car stalled, but she was not hurt. The police initially thought the device was a bomb. After determining that it was a kill switch, HPD investigators turned the matter over to the burglary and theft division – the division in which Fincher and Wells worked. Although Minns was listed as a suspect on at least one police report, Minns was never questioned about the incident. Piotrowski knew her life was in danger.

Undeterred by Franks's failure, Bell shopped the murder contract to other would-be assassins. Bell spoke to at least three other people about killing Piotrowski: James Perry Dillard, Rick Waring, and Robert Jess Anderson. Anderson ultimately hired Nathaniel Ivery, the gunman, and Patrick Steen, the driver of the getaway car, to kill Piotrowski. On October 20, 1980, Ivery shot

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[6] Besides placing the kill-switch on Piotrowski's car, Franks testified that on another occasion he followed her on his motorcycle with a kitchen knife. After deciding that he would not kill her himself, Franks tried to "subcontract" the job to another man in Piotrowski's apartment complex, known as "Bobby." Bobby disguised himself and went to Piotrowski's apartment with a knife. Fortunately, Piotrowski was not home at the time, and Bobby did not make another attempt on her life.

Piotrowski four times while she was sitting in her parked car outside a doughnut shop in Houston. The shooting paralyzed Piotrowski from the chest down. Ivery, Steen, Anderson, and Bell were all eventually convicted for their roles in the shooting.

Whether HPD was forewarned of the possible shooting was disputed at trial. Approximately five weeks before the shooting, Waring told his friend John Liles, an officer in the criminal intelligence division of the HPD, that Bell had solicited Waring and others to murder Piotrowski. According to Waring, Liles responded that the matter was now in police hands and that Waring should not warn Piotrowski.

Liles testified that he took the tip seriously and reported it to his supervisor, Lieutenant Reece. According to Liles, Reece prevented Liles from investigating the tip on his own and told Liles to submit a report to Captain Adams, the head of the homicide division.[7] Adams testified that he first became aware of the tip when Liles called him the morning after the shooting. Adams said that he never saw a report from Liles and would have acted on it had he seen it. Detective Kenneth Ray Williamson, who headed HPD's investigation of the shooting, testified that he did not think that Liles ever wrote a

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[7] Although Liles contends that he did write and file such a report, the only reference to a murder-for-hire tip is an entry in a criminal intelligence division ("CID") log that ascribes a CID case number, refers to Liles's name, and includes the notation "solicitation of capital murder" with the date "9-8 of '80." No officer, including Liles, was able to produce a copy of the report.

report before the shooting given Liles's personal connections with Waring and Bell.

Despite assurances that the HPD was conducting a full investigation, Piotrowski maintains that the HPD was actually closing ranks and protecting Minns, Bell, Fincher, and Wells. Despite the facts that (1) Waring, Anderson, and Dillard all told Williamson that Bell had offered them $10,000 to kill Piotrowski, and (2) Bell's ex-wife turned over a note in Bell's handwriting that listed a dollar amount of $10,000 and Piotrowski's name, address, and type of vehicle, Bell was not charged with solicitation of capital murder until Franks offered to assist the police in 1984. Minns was allowed to leave the country without ever being interrogated, subpoenaed, or charged in relation to the shooting of Piotrowski.

Piotrowski's suit against the City is based largely on a deposition given by Liles in early 1993 for another case.[8] In that deposition, Liles charged that the homicide division "dropped the ball" on his tip by failing to warn Piotrowski. He claimed that Reece prevented him and another officer from warning Piotrowski and that the HPD closed ranks to protect the officers involved in the

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[8] Liles sued Williamson (and others) for libel for statements made in a book written about Piotrowski's case, entitled *Sleeping with the Devil*. As part of that case, Liles's deposition was taken. Piotrowski claims that Liles's deposition revealed new information to her about the HPD preventing Waring from warning her and the HPD's "code of silence" regarding possible mistakes in the investigation. As discussed below, Piotrowski argues that she could not establish her § 1983 claim before receiving this information.

investigation, especially those who had a close relationship with Bell.

Not until September 1993, after learning about the contents of Liles's deposition, did Piotrowski file her first lawsuit against the City. Piotrowski alleged that the City violated 42 U.S.C. § 1983 by depriving her of due process and equal protection rights under the Constitution. In particular, she asserted that the City violated substantive due process by maintaining a custom or policy that affirmatively helped Bell to carry out the attack on her. She also alleged that the City denied her equal protection of the laws by discriminating against women in domestic violence disputes while favoring wealthy men in such suits.

The district court granted the City's motion to dismiss the case with prejudice under Fed.R.Civ.P. 12(b)(6) on the ground that Piotrowski's complaint was time-barred. On appeal, this court held that fact issues existed on the statute of limitations, but it also observed that Piotrowski had failed to "allege that a causal link existed between a City policy or custom and the alleged state-created danger." *See Piotrowski v. City of Houston*, 51 F.3d 512, 517 (5th Cir.1995) (*"Piotrowski I"*). While her pleading deficiency warranted dismissal, it was possible that Piotrowski could allege such a causal connection. Hence, this court modified the judgment to preserve Piotrowski's right to file an amended complaint.

Further procedural jockeying in the district court led Piotrowski to file a second lawsuit against the City in August 1995. In January 1998, a jury found for Piotrowski on her state-created danger and equal protection claims.

The district court entered a judgment in excess of $26 million, including attorney fees.

The City timely appealed. Among many issues it has raised, we need discuss only the statute of limitations verdict and the questions surrounding municipal liability.

II. ANALYSIS

A. *Statute of Limitations*

The City first contends that judgment as a matter of law should have been granted to reverse the jury's finding that Piotrowski's complaint was not time-barred.[9] The statute of limitations for a suit brought under § 1983 is determined by the general statute of limitations governing personal injuries in the forum state. *See Pete v. Metcalfe*, 8 F.3d 214, 217 (5th Cir.1993). Since Texas has a two year statute of limitations for personal injury claims, *see Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir.1989),[10]

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[9] This court reviews a district court's denial of a motion for judgment as a matter of law de novo, applying the same standard as the district court. *See Rutherford v. Harris County, Texas*, 197 F.3d 173, 178 (5th Cir.1999). The district court properly grants a motion for judgment as a matter of law only if the facts and inferences point so strongly in favor of one party that reasonable minds could not disagree. *See id.* at 179. "In ruling on a rule 50 motion based upon the sufficiency of the evidence, we 'consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion.' " *Information Communication Corp. v. Unisys Corp.*, 181 F.3d 629, 633 (5th Cir.1999) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc)).

[10] *See also* Tex. Civ. Prac. & Rem.Code Ann. § 16.003(a) (Vernon Supp.1998).

Piotrowski had two years to file suit from the date her claim accrued.

Accrual of a § 1983 claim is governed by federal law: "Under federal law, the [limitations] period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.' " *Russell v. Bd. of Trustees*, 968 F.2d 489, 493 (5th Cir.1992) (quoting *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir.1987)), cert. denied, 507 U.S. 914, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993). A plaintiff's awareness encompasses two elements: "(1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions." *Piotrowski I*, 51 F.3d at 516. A plaintiff need not know that she has a legal cause of action; she need know only the facts that would ultimately support a claim. *See Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir.1983). Actual knowledge is not required "if the circumstances would lead a reasonable person to investigate further." *Piotrowski I*, 51 F.3d at 516.[11]

The City argues that Piotrowski either knew of the facts underlying her claims at the time of the attack in 1980 or should have inquired into the actions of the police officers at that time. With respect to the state-created danger theory, Piotrowski responds that the HPD's "code

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[11] *See also Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir.1988) ("Under federal law, the limitations period commences when 'the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge' thereof." (quoting *Vigman v. Community Nat'l Bank and Trust Co.*, 635 F.2d 455, 459 (5th Cir.1981)))

of silence" precluded her from knowing pertinent facts until January 1993, when Liles was deposed in relation to his pending libel suit against Williamson and others. From that deposition, Piotrowski alleges that she learned for the first time that the HPD took affirmative steps to suppress any information concerning their investigation and the HPD's prior knowledge of the Waring tip.[12]

At trial, the City did not object to the form of the jury interrogatory that asked whether the plaintiff knew or should have known of the causal connection between her injuries and "the defendant's actions creating a state-created danger" on or before September 27, 1991 (two years before suit was filed). The jury decided that Piotrowski should not have known about the facts concerning causation before this time.[13]

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[12] The City contends that Piotrowski had all the information relevant to her § 1983 claims shortly after she was shot. According to the City, Piotrowski knew the police (1) had received a tip (the book, *Sleeping with the Devil*, published in 1991, discussed this tip), (2) had not advised her of the tip, and (3) failed to prevent the attack on her. Piotrowski maintains that she did not know until after Liles's deposition that the City itself, as opposed to individual officers, had a policy of assisting Bell and keeping information from Piotrowski.

[13] In cases where fraudulent concealment is involved, the statute of limitations does not begin to run until the relevant facts, which are in the control of the defendant, become known to the plaintiff: "When a defendant controls the facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation, a cause of action accrues, but the statute of limitations is tolled." *Piotrowski I*, 51 F.3d at 517. *See also United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 359, 62 L.Ed.2d 259 (1979); *Frazier v. Garrison Indep. Sch. Dist.*, 980 F.2d 1514, 1521-22 (5th Cir.1993).

There is sufficient evidence for the jury to have concluded that Piotrowski could not make a case for the City's possible affirmative involvement in the contract on her life until Liles's 1993 deposition. Only after the deposition could Piotrowski suspect that the City, as opposed to individual officers, had actively protected and/or assisted Bell. The deposition revealed that: (1) Waring and Liles were deterred from warning her, (2) Franks had received a police mug shot of Piotrowski from Bell, and (3) the police had a "code of silence" with respect to the investigation into her shooting. (Whether such facts, if proved, were sufficient to sustain a claim is another matter, discussed *infra*.) Thus, Piotrowski's first action was timely filed, within eight months of her learning of the ostensible causal connection in January 1993.[14]

However, the same is not true for Piotrowski's equal protection claim, a claim not predicated on any facts learned from Liles's 1993 deposition. Piotrowski testified

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[14] The doctrine of equitable tolling protects her second suit, filed in 1995, from untimeliness. When the applicable statute of limitations is borrowed from the state, that state's tolling provisions are to be the "primary guide" for the courts. *FDIC v. Dawson*, 4 F.3d 1303, 1312 (5th Cir.), cert. denied, 512 U.S. 1205, 114 S.Ct. 2673, 129 L.Ed.2d 809 (1994). Under Texas law, "where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right." *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir.1992) (citing *Weisz v. Spindletop Oil and Gas Co.*, 664 S.W.2d 423, 425 (Tex.App.-Corpus Christi 1983, no writ)). Piotrowski was prevented from filing suit because the trial court had initially dismissed her claim with prejudice, a disability not removed until the decision of this court in *Piotrowski I*.

that, in 1980, she "didn't feel as if [she and Minns] were being treated equally," and that she "didn't feel as if [she] was being treated in the same manner that Richard Minns was being treated in response to [his] complaints." In fact, in an interview with an officer investigating one of her IAD complaints against Fincher and Wells, Piotrowski asked the officer "[w]hy all their protection is on [Minns's] side." Piotrowski thus fails to explain what information in Liles's deposition was not known or could not have been discovered through due diligence. Although the deposition may have revealed information concerning the HPD's custom or policy of protecting and assisting Bell, the information is unrelated to Piotrowski's equal protection claim.[15] As a result, the equal protection claim is time-barred, and the judgment on that claim cannot be sustained.

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[15] The equal protection clause requires that all persons similarly situated be treated alike. *See City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1989). In order to establish a violation of equal protection, a plaintiff must show " 'the existence of purposeful discrimination' motivating the state action which caused the complained-of injury." *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir.1997) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 292-93, 107 S.Ct. 1756, 1767, 95 L.Ed.2d 262 (1987)). Piotrowski relies on Liles's deposition to establish that the HPD had a policy of protecting Bell and/or other men bers of the HPD. But Liles's deposition simply does not speak to intentional discrimination against Piotrowski based on an impermissible classification (be it wealth or gender).

B. *The City's Liability*

1. Municipal Policy and Culpability

Under the decisions of the Supreme Court and this court, municipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose "moving force" is the policy or custom. *Monell v. Dep't. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978).[16] *Monell* and later decisions reject municipal liability predicated on *respondeat superior*, because the text of section 1983 will not bear such a reading. *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997). Consequently, the unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur;[17] isolated unconstitutional actions by

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[16] The municipal policy must cause the violation of another's rights:

> [Section 1983] imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights . . . Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "causes" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent. *Monell*, 436 U.S. at 692, 98 S.Ct. at 2036.

[17] Another way to put this is that there must be both municipal culpability and causation. *See Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir.1998) (no liability for a city where a police officer shot a § 1983 plaintiff). Culpability includes both the involvement of a municipal policymaker and affirmative municipal action.

municipal employees will almost never trigger liability. *Bennett v. City of Slidell*, 728 F.2d 762, 768 n. 3 (5th Cir.1984), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); *McKee v. City of Rockwall*, 877 F.2d 409, 415 (5th Cir.1989), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990).[18] The three attribution principles identified here – a policymaker, an official policy and the "moving force" of the policy – are necessary to distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself. Mistakes in analyzing section 1983 municipal liability cases frequently begin with a failure to separate the three attribution principles and to consider each in light of relevant case law.

Here, for instance, the City never insisted that Piotrowski identify a municipal policymaker who could be held responsible, through actual or constructive knowledge, for enforcing a policy that caused Piotrowski's injuries. This is not an opaque requirement: several Supreme Court cases have discussed the policymaker criterion for municipal liability.[19] This court's

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[18] *Compare Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir.1985). This case is often misread as suggesting that municipal liability may be imposed for individual unconstitutional acts of lower-level employees. *Grandstaff* recognized that isolated instances of police misbehavior do not prove acquiescence by a city policymaker in that conduct. The court affirmed municipal liability, however, because the sheriff's actions after a police shooting essentially ratified the officers' use of excessive force.

[19] *See*, e.g., *Jett v. Dallas Independent School District*, 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *St. Louis v. Praprotnik*, 485 U.S. 112, 126, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988);

seminal decision on municipal section 1983 liability emphasized that:

> Actual or constructive knowledge of [a] custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority.

Webster v. City of Houston, 735 F.2d 838, 842 (5th Cir.1984) (en banc).[20] *Webster* identified the Mayor, City Council and Chief of Police as Houston's presumptive policymakers for the police, and stated that without proof, it was inconceivable that any officers subordinate to the Chief "even possibly could have occupied the role of a city policymaker." *Webster*, 735 F.2d at 842. Since the City chose not to pursue this angle of defense, no more need be said of it.

Instead, the City rests on the other two attribution principles, those of official policy and moving force, contending that insufficient evidence supports the verdict on these issues and that the jury charge was inadequate. To examine these contentions, it is necessary to sketch the rules governing municipal policy and causation of constitutional injuries and then to apply those rules to each of the policies subsumed by Piotrowski's claim.

Pembaur v. City of Cincinnati, 475 U.S. 469, 482-83, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

[20] Plainly, if a violation is caused by an unconstitutional ordinance or regulation officially adopted and promulgated by the municipality's lawmaking officers or by an official who has been delegated policymaking authority, those individuals are the policymakers. *Webster*, 735 F.2d at 841.

Municipal liability for section 1983 violations results if a deprivation of constitutional rights was inflicted pursuant to official custom or policy. Official policy is ordinarily contained in duly promulgated policy statements, ordinances or regulations. But a policy may also be evidenced by custom, that is:

> (2) . . . . a persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy . . . Actions of officers or employees of a municipality do not render the municipality liable under section 1983 unless they execute official policy as above defined.

Webster, 735 F.2d at 841; *See also Bryan County*, 520 U.S. at 405-07, 117 S.Ct. at 1387.

While an unconstitutional official policy renders a municipality culpable under § 1983,[21] even a facially innocuous policy will support liability if it was promulgated with deliberate indifference to the "known or obvious consequences" that constitutional violations would result. *Bryan County*, 520 U.S. at 407, 117 S.Ct. at 1389, 1390.[22] Deliberate indifference of this sort is a

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[21] *See* n.18, *supra; see also City of Newport v. Fact Concerts*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

[22] "[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' to its known or obvious consequences." *Bryan County*, 520 U.S. at 407, 117 S.Ct. at 1390 (citing *Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)).

stringent test, and "a showing of simple or even heightened negligence will not suffice" to prove municipal culpability. *See id.* It follows that each and any policy which allegedly caused constitutional violations must be specifically identified by a plaintiff, and it must be determined whether each one is facially constitutional or unconstitutional.

In addition to culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation. *Monell* describes the high threshold of proof by stating that the policy must be the "moving force" behind the violation. *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037-2038. *See also Canton,* 489 U.S. at 389, 109 S.Ct. 1197. This court summed up the relevant standards as follows:

> *Bryan County* underscores the need for *Monell* plaintiffs to establish both the causal link ("moving force") and the City's degree of culpability ("deliberate indifference" to federally protected rights). These requirements must not be diluted, for "[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability."

Snyder v. Trepagnier, 142 F.3d at 796, citing *Bryan County,* 520 U.S. at 410, 117 S.Ct. at 1394.

Unfortunately, Piotrowski's specification of the policies she challenges has been vague, and she has hardly

addressed their constitutionality.[23] The City denies that any policy or custom is at all tied to Piotrowski's injuries and instead tries to lay the blame on the misconduct of rogue officers. The jury charge did nothing to sort out the policies or the requirement of deliberate indifference or to connect each policy as the moving force behind a constitutional violation.[24] Our task in analyzing the sufficiency of evidence on appeal is immensely more complex than it should be.[25]

What we glean from Piotrowski's briefs and the record are several alleged customary policies:

> (1) The City's acquiescence in off-duty employment of Officers Fincher, Wells and others by Dudley Bell, a known criminal, and Richard Minns;[26]
>
> (2) the City's failure to investigate properly or discipline Fincher and Wells based on

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[23] Piotrowski's reliance on a Title VII retaliation case, *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir.1999), to prove the existence of a municipal custom or policy in this case is misplaced.

[24] Instead, the jury was asked to find only whether "as a result of a custom, policy or practice, the [City] violated the Plaintiff's civil rights by creating a 'state created danger,' which resulted in injury to the Plaintiff." No specific custom, policy or practice was identified in the charge or interrogatories.

[25] The test that we apply for reviewing the sufficiency of the evidence is the *Boeing* standard in n.7 *supra*.

[26] The City persists in asserting that such off-duty employment violated HPD policies, but that position is belied by the evidence that many people in the Department were aware of these officers' connection with Dudley Bell and with Bell's hiring of other HPD officers.

> Piotrowski's complaints of their improper acts in California; threats of prosecution; pressure to sign an agreement with Minns; irregular search of her apartment; and false arrest;
>
> (3) the City's failure to charge Bell or Minns for their offenses against Piotrowski, including illegal searches, baseless prosecutions, arson, wiretapping, the installation of the kill switch on her car, vandalism and theft; and
>
> (4) the City's affirmative assistance to the attempted murder of Piotrowski by not investigating the kill switch incident, handing out her mug shot, and suppressing Waring's and Liles's attempts to warn her and investigate the hit contract.[27]

The reason the policies or customs must be disaggregated should be clear. Taken together, they express no single municipal policy but only a series of adversarial conclusions by Piotrowski (e.g., "the Houston Police Department was up for sale in 1980") relating to her individual case. "Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n. 3

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[27] None of these "policies" was specifically distinguished in the jury charge or interrogatories, and because Piotrowski's closing arguments were colloquial, the policies were not carefully articulated there either. With one exception, the City did not insist upon greater clarity. It is imperative that the policies for which municipal section 1983 liability is sought be specified in the trial court. Otherwise, the line between respondeat superior liability and truly unconstitutional municipal conduct quickly blurs, and the intent of section 1983 is forsaken. *See Snyder*, 142 F.3d at 796.

(5th Cir.1984), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). A customary municipal policy cannot ordinarily be inferred from single constitutional violations. *See, e.g., Webster*, 735 F.2d at 851. Further, each of the cited customs concerns a discrete police department program or area of decision-making, and each invokes separate aspects of the policy issue. Finally, each alleged policy may have had a distinct impact as the moving force of her state-created danger claim. In *Bryan County*, for example, the Court carefully distinguished between municipal liability for failure to train and liability for a single negligent hiring decision. *See Bryan County*, 520 U.S. at 398, 117 S.Ct. at 1391.

Turning first to the City's acquiescence in police officers' moonlighting for Dudley Bell, a policy appears to have been proven. As the touchstone for establishing customary policy is a persistent and widespread practice, *see Webster*, 735 F.2d at 841, the evidence suggested that Bell had hired off-duty policemen, not just Fincher and Wells, for many years notwithstanding official police department policy that would have discouraged their employment by any man with a criminal record. This customary policy represented the height of poor judgment, inasmuch as it invited conflicts of interest if and when the police department should have to investigate Bell, his employees, or the clients of his private investigation firm. Poor judgment is not, however, facially unconstitutional. The City could only be liable for Fincher's and Wells's moonlighting if it was deliberately indifferent to known consequences such as the likelihood that the officers would assist Bell in committing crimes. The City

failed to insist upon proof of deliberate indifference, however, so that standard is waived.

Assuming, then, that the moonlighting policy did demonstrate deliberate indifference, the evidence is nevertheless insufficient to establish that it was the moving force that caused Piotrowski to be shot, or that it resulted in a "state created danger" to her life. None of Dudley Bell's previous misdeeds were contract killings. As a private investigator and bodyguard, surveillance and protective duties could be expected of his employees. Abuses of these services could foreseeably result in the wiretapping, vandalism, and false charges to which Piotrowski was exposed. But there is no evidence that the City could have been deliberately indifferent to the likelihood that officers moonlighting for Bell would get involved in murder for hire, and there is also no evidence that Fincher or Wells knew of or had any role in Bell's attempt to have Piotrowski killed. The municipal policy allowing improper moonlighting employment may have been culpable, but causation was not established.

The second alleged policy resides in the City's failure to investigate and discipline Fincher and Wells when Piotrowski and her family made several IAD complaints about them. On the facts of this case, no unconstitutional municipal custom or policy was proven. Self-evidently, a City policy of inadequate officer discipline could be unconstitutional if it was pursued with deliberate indifference toward the constitutional rights of citizens. The question is how to prove the existence of such a policy. One indication might be a purely formalistic investigation in which little evidence was taken, the file was bare, and the conclusions of the investigator were perfunctory.

No such deficiency appears on the record before us. The IAD investigator responded to lengthy complaints by or on behalf of Piotrowski, received nearly as lengthy responses from Fincher and Wells, and reviewed relevant police department records like the search warrant. Regardless whether one agrees or disagrees with the IAD conclusions exonerating Fincher and Wells, the IAD file reveals no systematic inattention to the complaints.

A more fundamental point is that the failure to discipline arises only from this plaintiff's and her associates' allegations against the officers. Piotrowski did not offer evidence of any other IAD complaints made against Fincher and Wells. There is no pattern of complaints by other citizens. As is the case with allegations of failure to adequately screen prospective police officers, it is nearly impossible to impute lax disciplinary policy to the City without showing a pattern of abuses that transcends the error made in a single case. *See Bryan County*, 520 U.S. at 410-11, 117 S.Ct. at 1391. A pattern could evidence not only the existence of a policy but also official deliberate indifference.

The City did preserve error to the jury charge on this policy, as it requested a deliberate indifference instruction if the jury was instructed that it could find liability for the City's failure to act to prevent the misdeeds of its police officers. Consequently, even if we concluded that an unconstitutional policy of inadequate discipline was sufficiently proved, we would have to reverse any judgment predicated on this theory because of the court's error in omitting the deliberate indifference charge. This asserted policy fails, however, for lack of proof of a

pattern of unremedied abuses of citizens' rights by Fincher and Wells.

The third alleged policy is that the police failed to bring charges against Bell or Minns at Piotrowski's urging. At one point, she implied to the jury that her tormentors would have been locked up and would not have been free to plan her murder had the police taken action in the first half of 1980. Tragic though it is in hindsight when the police fail to enforce the law strictly against wrongdoers, decisions not to prosecute cannot be the subject of policy determinations for purposes of section 1983 liability. *See generally Pinder v. Johnson,* 54 F.3d 1169 (4th Cir.1995) (en banc). The *DeShaney* decision absolves public officials of individual section 1983 liability for failure to protect citizens absent a "special relationship" such as official custody of the victim. *See DeShaney v. Winnebago Cty. Dep't of Social Servs.,* 489 U.S. 189, 201, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Walton v. Alexander,* 44 F.3d 1297, 1298 (5th Cir.1995) (en banc). A city cannot be liable to a member of the public for failing to prosecute a known wrongdoer if no individual City employee could be liable constitutionally for the same neglect.[28]

Finally, Piotrowski charged that City policy extended even to the unthinkable – its affirmative assistance of Bell's carrying out a murder contract on her life. This appears to be the essence of what the jury charge described as a City custom or policy which created a state-created danger. There is no evidence, however, that

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[28] As stated in *DeShaney* of course, a different situation might result from the wholesale failure to protect a class of people, e.g. minorities, 489 U.S. at 197, n. 3, 109 S.Ct. at 1004 n. 3.

any action of any individual City employee, much less official custom or policy of the City, so assisted Bell.

The existence of this alleged policy turns on two facts. First, Franks testified that Bell gave him a police mug shot to use in identifying Piotrowski. Where the mug shot came from, who gave it to Bell and for what purpose it might have been given to him, are left unexplained by the record. Hence there is no evidence on which to base an adverse inference about the City's custom or policy.

Second, the jury evidently believed Officer Liles's testimony that he reported the threat of a hit contract both to Lieutenant Reece and to the homicide division. Lieutenant Reece told him not to get involved personally, and the homicide division lost Liles's report. Piotrowski was not officially warned of the murder contract, and no investigation took place before the homicide attempt. But again, there is no record evidence of any connection between Lieutenant Reece or members of the homicide division and Minns or Bell. On the contrary, the only evidence of police misconduct involved Fincher and Wells, who intervened against Piotrowski repeatedly – short of participating in the murder contract – as they provided inside-the-HPD assistance to their off-duty employer Bell when he harassed Piotrowski. Even as to Fincher and Wells, there is no evidence that they knew of or assisted in the attempted murder.

Piotrowski made a compelling case that Bell cultivated friendships in Houston's political community, among police and fire department officials, and even with judges, and that some of these relationships may have

contributed to his avoiding or minimizing prosecution for some illegal acts. But pinning affirmative involvement by *the City* in Piotrowski's attempted murder is beyond the inferences afforded in this record.[29]

After considering all four of the policies that Piotrowski alluded to at trial, we must conclude that none of them furnishes a basis for finding that the City maintained a wide-spread custom or policy that caused Piotrowski's injuries. No one could fail to be moved by the suffering that she has endured or would hesitate to condemn the police department's unwillingness to keep its officers from compromising off-duty employment. Difficult as these facts are, however, they do not suffice to carry the heavy burden that a plaintiff must bear in establishing municipal culpability and causation.

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[29] In her brief, Piotrowski also asserts that the "cooperation between HPD and Bell" led the department to (a)advise Bell that his kill-switch plan had been thwarted; (b) stop any investigation of the kill-switch; (c) stop Waring from warning Piotrowski of her danger; and (d) deliberately refuse to pursue leads against Minns and Bell. None of these charges adds to the case for a City policy related to the hit contract. First, Bell did not need to be tipped off to the kill-switch plan – Piotrowski had obviously survived it. Second, Fincher and Wells apparently diverted the kill-switch investigation to their division, but there is no evidence of involvement by other police officers in this act. Third, it was Liles who told Waring not to warn Piotrowski – Liles was no pawn of an allegedly corrupt police department. Fourth, failure to pursue leads against Minns and Bell is unsustained on this record (prior to the shooting) apart from the proven inaction of Fincher and Wells. These facts suggest misconduct by Fincher and Wells, not a general custom or widespread policy within the police department.

2. State created danger theory

Piotrowski persuaded the jury that unspecified customs or policies of the City effected a "state-created danger," causing her to be injured by third parties. For purposes of this discussion, we assume *arguendo* that "the City" could have been the unconstitutional actor. Even assuming such an anthropomorphization, however, Piotrowski's evidence was fatally deficient.

In general, local governments are under no duty to provide protective services: "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual . . . [Thus,] a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196-97, 109 S.Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989).[30] The Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *Id.*, 489 U.S. at 198, 109 S.Ct. at 1004. Courts have recognized at most two such limited circumstances – when the state has a special relationship

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[30] *See also Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir.1995) (en banc): "The due Process Clause confers protection to the general public against unwarranted governmental interference, but it does not confer an entitlement to governmental aid as may be necessary to realize the advantages of liberty guaranteed by the Clause."

with the person or when the state exposes a person to a danger of its own creation.[31]

Piotrowski argues that the City violated the Due Process Clause by failing to protect her from a danger that it created by affirmatively assisting Bell. Although this court has discussed the contours of the "state-created danger" theory on several occasions, we have never adopted that theory. *See Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir.1997), cert. denied, 525 U.S. 822, 119 S.Ct. 65, 142 L.Ed.2d 51 (1998); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir.1997) (en banc); *Piotrowski I*, 51 F.3d at 515. We need not do so here, since, even if we were to adopt it, Piotrowski could not recover.

In *Piotrowski I*, this court set out the basic requirements of the state-created danger theory: "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." 51 F.3d at 515.

Piotrowski alleged that the City created a danger by allowing its employees to affirmatively assist Bell in carrying out the attack on her. The facts have been summarized. The initial problem is that no matter what official protection Bell received, the City actors did not create the danger she faced. *See Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 n. 7 (10th Cir.1998) ("[i]f the

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[31] This court's decision in *Walton* precludes Piotrowski from arguing that the HPD's actions created a special relationship that required the police to protect her. Under *Walton*, a special relationship exists only if the plaintiff is "involuntarily confine[d] against [the plaintiff's] will through affirmative exercise of state power." 44 F.3d at 1306.

danger to the plaintiff existed prior to the state's intervention, then even if the state put the plaintiff back in that same danger, the state would not be liable because it could not have created a danger that already existed."). During her relationship with Minns, Minns became more violent and started using drugs. Minns had physically abused her at least twice while they lived together, breaking her nose and hand on one such occasion. Piotrowski also testified that Minns asked her to help him kill his first wife. Shortly after moving out of Minns's apartment, Piotrowski knew that her life was in danger. The record clearly demonstrates that Piotrowski was aware of Minns's propensity for violence given the various threats and acts of vandalism directed at Piotrowski, her attorney, and her family. According to a police report she filed, Minns had threatened her life on several occasions. And after the kill-switch incident, Piotrowski knew that Minns was trying to kill her.[32] Unlike other cases in which government officials placed persons in danger, the City at most left her in an already dangerous position.

Depending on the facts, some cases interpret the state-created danger theory to result in § 1983 liability if government actors *increase* the danger of harm to a private citizen by third parties. Measured by this standard, the assistance provided to Bell consisted of furnishing Piotrowski's mug shot and failing to warn her of Waring's tip. Neither of these circumstances, however,

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[32] After the kill-switch was discovered, Piotrowski told investigators that she believed Minns was responsible for this attempt on her life. The police report even listed Minns as a suspect.

actually increased the danger to her. The kill switch incident plainly signaled Minns's intentions and determination. And in the summer of 1980, before Waring's tip to Liles, Piotrowski's attorney had arranged bodyguard protection for her.

Moreover, the City did not act with deliberate indifference. To establish deliberate indifference, "[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir.1994). "The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." *Id.* (quotations and citations omitted). As has been discussed, there is no evidence that City actors knew of or participated in the murder contract, and they did nothing to prevent her from protecting herself.[33]

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[33] Piotrowski's case is, therefore, markedly different from cases in other jurisdictions in which the municipal employees created the dangerous situation and precluded the plaintiff from protecting herself. *See, e.g., Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), cert. denied, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990) (woman raped after police arrested the drunk driver of the vehicle she was in and left her alone at night in a high crime area); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir.1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990) (female city employee abducted by prisoner with a violent criminal history who was placed in an inmate work program at the town hall where she worked); *White*

For all these reasons, Piotrowski was the shooting victim of Richard Minns and Dudley Bell, not of circumstances created by the City actors.

III. CONCLUSION

Because Piotrowski failed to establish the grounds for municipal § 1983 liability and the state-created danger theory of substantive due process violation, and because her equal protection claim was time-barred, we must reverse and render the judgment. Nothing in this opinion should be taken as excusing or condoning any involvement by policemen or firefighters with men like Dudley Bell and Richard Minns.

REVERSED and RENDERED.

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v. Rochford, 592 F.2d 381 (7th Cir.1979) (children left by police officers alone in car on busy road after arresting driver).

United States Court of Appeals,
Fifth Circuit.

Barbara PIOTROWSKI, Plaintiff-Appellant,
v.
CITY OF HOUSTON and the Houston Police Department, Defendants-Appellees.

No. 93-2938.

April 21, 1995.

Marilyn Kay Lahr, Sumner & Schick, Dallas, TX, for appellant.

Andrea Chan, Arthur L. Pertile, III, Asst. City Atty., Houston, TX, for appellees.

Appeals from the United States District Court for the Southern District of Texas.

Before SMITH and EMILIO M. GARZA, Circuit Judges, and BERRIGAN, District Judge.*

EMILIO M. GARZA, Circuit Judge:

Barbra Piotrowski appeals the district court's dismissal of her civil rights suit against the City of Houston (the "City"),[1] which she brought under 42 U.S.C. § 1983 (1988). We modify and affirm.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

[1] Piotrowski's claim against the Houston Police Department as a separate defendant was dismissed and is not at issue in this appeal.

I

In 1980, gunmen shot Barbra Piotrowski in an attempt to kill her.[2] According to Piotrowski's complaint, Rick Waring told officers of the Houston Police Department five weeks prior to the shooting that Dudley Bell had solicited him to murder Piotrowski.[3] The officers allegedly told Waring that they would investigate his information and instructed him not to warn Piotrowski of the attempt to solicit her murder. Contrary to their assurances to Waring, the officers did not proceed to investigate.[4]

Piotrowski sued the City in 1993, alleging that the officers had interfered with Waring's attempts to warn her of the danger she faced and that other officers had aided Bell and the other persons conspiring to kill her by providing them with a picture of her. Piotrowski stated that she had not learned of these actions until January, 1993, when one of the officers revealed the alleged interference and affirmative assistance in a deposition for a civil case concerning a book written about Piotrowski. The district court granted the City's motion to dismiss with prejudice under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that Piotrowski's complaint was time-barred. Piotrowski appeals that dismissal.

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[2] Piotrowski alleged that Dudley Bell, who worked for her boyfriend, Richard Minns, hired the gunmen.

[3] Piotrowski alleged that Waring worked for Bell.

[4] Piotrowski also alleged that she had reported previously to the police that Minns was trying to kill her.

II

Piotrowski contends that the district court erred in dismissing her suit as time-barred. "We review a Rule 12(b)(6) dismissal de novo. We must accept all well-pleaded facts as true, and we review them in the light most favorable to the plaintiff." *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir.1994). In our de novo review, we apply the same standard as that used by the district court: "[A] claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir.1994) (citing *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir.1994); *Carney v. RTC*, 19 F.3d 950, 954 (5th Cir.1994)); *see also Green*, 27 F.3d at 1086 ("A dismissal will not be affirmed if the allegations support relief on any possible theory.").

The district court found that Piotrowski's claim was that the Police Department violated her civil rights when it failed to investigate Waring's story and failed to protect her from Bell and Minns, and decided that such claims accrue at the time of the injury. Because Piotrowski knew at the time she was shot that the Police Department had failed to protect her, the district court held that her claim had accrued in 1980, more than two years before she filed suit.[5] Piotrowski argues, however, that she is making

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[5] Congress has not provided a statute of limitations in § 1983 cases; therefore, federal courts borrow the forum state's general personal injury limitations period. *See Owens v. Okure*, 488 U.S. 235, 249-50, 109 S.Ct. 573, 581-82, 102 L.Ed.2d 594 (1989)

more than a failure-to-protect claim. She argues that her complaint states a § 1983 claim for a violation of her civil rights that resulted from affirmative acts of the Police Department that contributed to the danger she faced, and that her claim did not accrue until she acquired knowledge of these acts in January, 1993.

A

Piotrowski argues that the police officers' affirmative acts of preventing Waring from warning her and giving the conspirators her picture support a § 1983 claim of a "state-created danger."[6] "To state a claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Leffall*, 28 F.3d at 525. Our first inquiry is whether the plaintiff has

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(equating § 1983 claims with personal injury actions because both remedy injuries to personal rights). In Texas, the pertinent limitation period is two years from the day the cause of action accrues. *See* Tex.Civ.Prac. & Rem.Code Ann. § 16.003(a) (Vernon 1986) ("A person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues."); *see also Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir.1992) (borrowing two-year statute of limitations from Texas law for § 1983 case).

[6] Piotrowski also argues that the police officers' actions created a "special relationship" that required them to protect her. Our recent en banc decision in *Walton v. Alexander*, 44 F.3d 1297 (5th Cir.1995) (en banc), precludes this argument, however, by requiring "involuntary confine [ment] against [the plaintiff's] will through affirmative exercise of state power." 44 F.3d at 1306. Piotrowski has alleged no such confinement.

alleged a violation of a constitutional right at all. *Id.; cf. Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991) (establishing in qualified immunity context that first inquiry is existence of constitutional violation).

Generally, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989). "The Due Process Clause confers protection to the general public against unwarranted governmental interference, but it does not confer an entitlement to *governmental aid* as may be necessary to realize the advantages of liberty guaranteed by the Clause." *Walton*, 44 F.3d at 1302. While "it is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," *DeShaney*, 489 U.S. at 198, 109 S.Ct. at 1004, Piotrowski must show that her situation fits those "certain limited circumstances."

Piotrowski contends that her allegations qualify by satisfying the "state-created danger" theory of § 1983 liability.[7] While this Court has not affirmatively held that

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[7] In *Salas v. Carpenter*, 980 F.2d 299 (5th Cir.1992), this Court stated in dicta that *DeShaney's* "limited circumstances" could include two situations. *Salas*, 980 F.2d at 307. "First, a procedural or substantive due process violation could occur if a state official causes injury by arbitrarily abusing governmental power. Second, a substantive due process violation could occur if uncommon circumstances create a duty for the state to protect

this theory is a valid exception to the *DeShaney* rule, *see Johnson*, 38 F.3d at 200 (discussing Fifth and other circuits' uncertainty regarding theory's validity and commenting that *Salas* discussed the theory only in dicta), it has addressed what a plaintiff would have to demonstrate to qualify for relief under this theory. First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference.[8] In this case, Piotrowski alleges that the Police prevented Waring from warning

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a particular person." *Id.* Courts have referred to the first situation identified in *Salas* as the "state-created danger" theory of § 1983 liability: "When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct. . . . " *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200 (5th Cir.1994), *cert. denied*, 514 U.S. 1017, 115 S.Ct. 1361, 131 L.Ed.2d 218 (1995).

[8] *See Leffall*, 28 F.3d at 531 ("[T]he [state-created danger] cases consistently require a § 1983 plaintiff relying on substantive due process to show that the state actors are guilty of 'deliberate indifference' towards the victim of the deprivation.").

Even under the rationale of the cases recognizing a state-created danger theory of § 1983 liability, it is not enough to show that the state increased the danger of harm from third persons; the § 1983 plaintiff must also show that the state acted with the requisite culpability in failing to protect the plaintiff from that danger to make out a constitutional violation.

Id. at 530-31. Deliberate indifference requires the following: "[T]he environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson*, 38 F.3d at 201.

her of the threat against her and assisted the conspirators by giving them a picture of her.[9]

B

Before we reach whether a "state-created danger" constitutes a cognizable § 1983 theory, we determine first whether the district court correctly held that the statute of limitations would bar such a claim. Piotrowski contends that her claim accrued in January, 1993, when she discovered the relevant information from the police officer's deposition.

"Under federal law, the [limitations] period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.' " *Russell v. Board of Trustees*, 968 F.2d 489, 493 (5th Cir.1992) (quoting *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir.1987)), *cert. denied*, ___ U.S.___, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993).[10] A plaintiff's awareness encompasses two elements: (1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions. *See Stewart v. Parish of Jefferson*, 951 F.2d 681, 684 (5th Cir.) ("The statute of limitations period commences once the plaintiff acquires possession of two critical facts: (1) an injury has occurred; and (2) the identity of the person who inflicted

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[9] Because we hold that Piotrowski's allegations fail on other grounds, however, we do not reach the question of whether her allegations satisfy the Rule 12(b)(6) threshold for alleging a "state-created danger" theory of § 1983 liability.

[10] When a § 1983 cause of action accrues is a question of federal law. *Id.*

the injury."), *cert. denied*, 506 U.S. 820, 113 S.Ct. 69, 121 L.Ed.2d 35 (1992). A plaintiff need not realize that a legal cause of action exists; a plaintiff need only know the facts that would support a claim. *See Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir.1983) ("The plaintiff need not have knowledge of fault in the legal sense for the statute to begin to run, but she must have knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection . . . or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between the [defendant's acts] and injury.").[11] Moreover, a plaintiff need not have actual knowledge if the circumstances would lead a reasonable person to investigate further. *See Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir.1988) ("Under federal law, the limitations period commences when 'the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge' thereof." (quoting *Vigman v. Community Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir.1981)).[12]

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[11] *See also Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir.1989) (holding that limitations period on employment discrimination claim triggered on date of discharge, not on date of discovery of discriminatory intent), *cert. denied*, 494 U.S. 1067, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Longoria v. City of Bay City*, 779 F.2d 1136, 1138 (5th Cir.1986) (holding that limitations period began to run when flooding occurred, not when plaintiffs learned city had been on notice of flooding potential and had fraudulent motive).

[12] *See also Stewart*, 951 F.2d at 684 ("The prescriptive period will not commence prior to the time the plaintiff is *or should be* aware of the causal connection between his injury and the acts

The City argues that Piotrowski either knew of the facts underlying her claim at the time of the attack or should have inquired into the actions of the police officers at that time. In response, Piotrowski alleges that the police officers took active steps to suppress any information concerning their prior knowledge of the threat. When a defendant controls the facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation, a cause of action accrues, but the statute of limitations is tolled. *See United States v. Kubrick,* 444 U.S. 111, 122, 100 S.Ct. 352, 359, 62 L.Ed.2d 259 (1979) (tolling limitations period where "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."); *Frazier v. Garrison I.S.D.,* 980 F.2d 1514, 1521-22 (5th Cir.1993) (affirming summary judgment on limitations grounds, stating that: "No facts indicate to us that the alleged discrimination was either hidden or for some reason not apparent to a reasonable prudent person," and contrasting to scenario in which defendant's actions would not lead a reasonably prudent person to suspect critical facts and investigate further). Consequently, we cannot say as a matter of law that the

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of the defendant."); *Longoria,* 779 F.2d at 1138 ("The limitations period thus begins to run when the plaintiff either is or should be aware of both the injury and its connection with the alleged acts of the defendant."); *Lavellee v. Listi,* 611 F.2d 1129, 1131 (5th Cir.1980) (beginning limitations period "when the plaintiff is, or should be, aware of both the injury and its connection with the acts of defendant").

limitations period started in 1980.[13] Thus, if Piotrowski's "state-created danger" theory raises a cognizable constitutional claim under § 1983, the district court erred in determining that her suit was time-barred.

C

We need not decide, however, whether Piotrowski's "state-created danger" claim is a cognizable § 1983 theory that is not time-barred. Even if she has alleged a "state-created danger," she has failed to allege facts that implicate the City itself. A municipality does not incur liability under § 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978); *see also City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989) ("[O]ur first inquiry in any case alleging

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[13] Nor can we say as a matter of law that the limitations period did not start until January, 1993, when Piotrowski learned of the police officer's deposition. Although she acquired actual knowledge of the facts at that time, the City suggests that she could have obtained that information earlier. The lawsuit for which the 1993 deposition was taken concerned libel and slander claims brought by the police officers against the author of a book written about Piotrowski's case. The author acknowledges in the book that Piotrowski helped her develop the book. Alleging that the book discussed at least some of the relevant actions of the police officers, the City suggests that Piotrowski either knew or should have known of the police officers' actions prior to the 1991 publication of the book. Determining the validity of the City's contention, however, would require us to go beyond the pleadings, and we will not entertain it at this time.

municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation."); *Leffall*, 28 F.3d at 525 (requiring allegation that policy or custom was "a cause in fact of the deprivation of rights inflicted"); *Colle v. Brazos County*, 981 F.2d 237, 244 (5th Cir.1993) ("[O]nly when the execution of a county's policies or its customs deprives an individual of constitutional or federal rights does liability under § 1983 result.").

Piotrowski alleges that the police officers increased the threat to her life, but she does not allege that the increased danger resulted from the City's policies. Nowhere in her substantive due process claim does Piotrowski allege that a causal link existed between a City policy or custom and the alleged state-created danger. Rather, she alleges that the increased danger resulted from the actions of certain police officers. Because the City cannot be held liable under a *respondeat superior* theory, *Monell*, 436 U.S. at 691, 98 S.Ct. at 2036, Piotrowski has failed to allege facts supporting a § 1983 claim against the City.

III

For the foregoing reasons, we AFFIRM the dismissal of Piotrowski's suit. We modify the district court's judgment, however, to dismiss without prejudice to Piotrowski's right to file an amended complaint.[14]

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[14] We dismiss without prejudice because we cannot say as a matter of law that Piotrowski cannot allege any set of facts supporting a causal link between a City policy and the alleged increased danger; we merely hold that she has not done so in the complaint filed in this case. *See Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 715 (5th Cir.1994) (dismissing § 1983 suit without prejudice where no policy alleged but no limitations bar to amended complaint).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Barbra PIOTROWSKI, Plaintiff, v. CITY OF HOUSTON, Defendant.	§ § § § § § § §	CIVIL ACTION NO. 95-4046. (Filed May 5, 1998)

ORDER OF SANCTIONS AND ADMONISHMENT

Pending before the Court is Plaintiff's Supplemental Motion for Sanctions[1] (Document #166) filed by plaintiff Barbara Piotrowski ("Piotrowski"). Having considered the motion, submissions, and applicable law, the Court determines that the motion should be granted in part.

This matter was tried to a jury in this Court on January 6-16, 1998. After deliberations, the jury reached a verdict in favor of Piotrowski in the total amount of $22,338,000.00 and against the defendant the City of Houston. Thereafter, Piotrowski filed this motion complaining of the course of conduct of the City of Houston's trial counsel, Rebecca Schlosser, Judith Sanchez, and Andrea Chan, and requesting that this Court impose sanctions against the City of Houston and these attorneys. Piotrowksi seeks sanctions pursuant to 42 U.S.C.

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[1] Piotrowski titles this post-trial motion as a "supplemental motion" for sanctions as she had filed a motion for sanctions pre-trial, complaining of discovery abuses by the defendant the City of Houston. *See* Document # 73.

§ 1927, Fed.R.Civ.P. 37(c), and pursuant to this Court's inherent power.

The conduct that Piotrowski complains of represents a continuous pattern of confrontational, antagonistic, unreasonable, and unprofessional conduct by trial attorneys representing the City of Houston. Piotrowski argues that her attorneys were forced to prepare for trial without the benefit of highly relevant documents. Further, throughout the trial, she was forced to respond to and defend against newly presented evidence and false statements. For example, Piotrowski had requested in her discovery requests the written policies and procedures of the Houston Police Department ("HPD") in effect in 1980. In response, the City informed her that no such documents existed. However, during the trial, several witnesses who are HPD officers made reference to the "Rules Manual" that was in existence in 1980. At that time, the City continued to deny that such a manual existed. Notwithstanding these representations, it became clear after further witness testimony that the manual did in fact exist. The Court ordered the Rules Manual produced and finally it was produced on January 14, 1998, the last morning of trial.

Similarly, other responsive documents that were requested prior to trial were also not produced. For example, Piotrowski sought documents relating to HPD policy of handling domestic disputes. Again she was told that no such documents existed. However, during trial the City actually used the very document that Piotrowski had requested.

Piotrowski further complains of the City's egregious conduct in using at trial several items of evidence provided to it directly by Richard Minns. During the trial, the City was given a copy of a video tape. Upon questioning, Schlosser revealed to the Court that the video was provided to her by counsel for Minns. Thereafter, Piotrowski observed counsel for Minns passing a note to Chan during trial. Schlosser vehemently insisted that she had instructed counsel for Minns to stop all contact with the City of Houston attorneys. Notwithstanding this representation that no further cooperation was taking place, the City later attempted to impeach Piotrowski with a deposition provided directly to it by counsel for Minns. Not only did the City intentionally mislead the Court with respect to its continued contact with Minns, but the deposition used for the impeachment was unsworn, unsigned, and incomplete. As such, it was completely improper to attempt to impeach Piotrowski with such a deposition.

Piotrowski also points to Schlosser's intentionally misleading the jury and the Court during her questioning of Richard Bean, Ph.D., the economic expert for Piotrowski. During Dr. Bean's testimony, Schlosser asked Dr. Bean whether he was familiar with an American Medical Association's one-year moratorium on students graduating from medical schools. Dr. Bean testified that he was not familiar with such a moratorium. At that point, the Court demanded proof of such an allegation from Schlosser. Schlosser stated that she had the supporting document in her office and would present it to the Court the following Monday of trial. Thereafter, Schlosser handed the Court an article which she admitted did not

support her statement. Furthermore, it was later learned that the article did not come from Schlosser's office but that others in her office had spent the weekend attempting to find support for this statement. Later Schlosser admitted to the Court that she could not recall where she had read or heard about the alleged one-year moratorium on graduating medical students.

As a sanction for this pattern of conduct Piotrowski urges the Court to impose monetary sanctions and to make certain findings of fact establishing various elements of her case. *See* Plaintiff's Supplemental Motion for Sanctions at 1-2. However, while substantial monetary sanctions would be warranted, *see* 28 U.S.C. § 1927,[2] the Court declines to do so and declines to make findings of fact. Instead, the Court elects to proceed with an alternative sanction. Piotrowski seeks sanctions against Sanchez, Chan, and Schlosser.

Schlosser, designated as lead trial counsel, indicated to the Court that she had joined the trial team only "a couple of weeks" before trial commenced on January 6, 1998. *See* Transcript of January 5, 1998 at 2. Thus, although her trial conduct was, on occasion, unprofessional and negligent, the Court determines that she should not be sanctioned by the Court because of her relative unfamiliarity with the case and because she did

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[2] "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

not participate in the pattern of discovery abuses and other misconduct that occurred prior to trial. However, Schlosser is admonished that such behavior as she exhibited during the trial is unacceptable in federal court.

The Court further notes that contrary to Schlosser's representation to the Court that she had only joined the trial team "a couple of weeks" prior, the then City Attorney, Eugene Locke, is reported as having stated that Schlosser actually had been working on the case since the fall of 1997.[3]

The Court also notes that Sanchez and Chan are not alone to blame for the display of substandard and unprofessional conduct manifested by the attorneys representing the City of Houston throughout the course of pretrial and trial. The fault also lies with their superiors with the City of Houston Attorney's Office for their negligence and apparent lack of concern in assigning such inexperienced and junior attorneys to a complex and highly-charged federal civil rights case with absolutely no discernable supervision. Inexperience however, does not excuse the course of conduct exhibited by Sanchez and Chan in this case. However, in the Court's opinion, the overall professional performance of the City Attorney's office, including the conduct of its highest ranking attorneys, was appalling.

The utter lack of concern and attention to the unprofessional conduct of Sanchez and Chan is exacerbated further by the fact that the City Attorney Eugene

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[3] *See* Richard Connelly, *How to Beat City Hall*, Houston Press, February 26-March 4, 1998 at 22.

Locke and First Assistant City Attorney Berta Mejia, were alerted to problems with Sanchez and Chan prior to the commencement of trial. On December 31, 1997, the Court sent by separate facsimile transmission copies of an Order entered on that same date to Locke and Mejia directly. The Order, denying the City of Houston's Motion for Authentication of and Objection to Plaintiff's Exhibits, pointed out that Sanchez and Chan's conduct in filing that motion bordered on a violation of 28 U.S.C. § 1927.[4] The Order of December 31, 1997 explained that Sanchez and Chan had filed a 121-page motion with 237 objections to Plaintiff's 238 proposed trial exhibits (*some of which were objections to the City of Houston's own proposed exhibits*). Despite the foregoing, nothing was done.

The Court specifically finds that sanctions are appropriate with respect to Sanchez and Chan. Courts are necessarily vested with the control "to manage their own affairs as to achieve the orderly and expeditious disposition of cases." *See Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991) (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)). The conduct of Sanchez and Chan prior to and during trial of this case constituted bad faith conduct that interfered with the Court's administration of justice and preservation of the Court's dignity and integrity. Federal courts will not tolerate such conduct in their forum.

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[4] The Order stated: "After examining all of the objections, the Court determines that many, if not all, are strictly "form" objections comprised of boilerplate language. As such they are totally unrealistic, attempt to place an unacceptable burden on the Court and opposing counsel, and border on the unprofessional. *See* 28 U.S.C. § 1927."

Accordingly, the Court is of the opinion that Sanchez and Chan should be formally sanctioned and reprimanded.

Based on the foregoing, the Court hereby

ORDERS that the Supplemental Motion for Sanctions (Document # 166) is GRANTED in part.

The Court formally ADMONISHES Assistant City of Houston Attorney Rebecca Schlosser.

The Court formally SANCTIONS Assistant City of Houston Attorneys Judith Sanchez and Andrea Chan.

Sanchez and Chan are ORDERED to enroll in and attend, no later than December 31, 1998, the Ethics Course offered by the Texas Center for Legal Ethics and Professionalism. Each attorney shall provide the Court with a certification of her in-person attendance no later than December 31, 1998. Failure of Sanchez and Chan to produce timely the certification of attendance shall result in the issuance of a Show Cause Order by this Court to show cause why they should not be held in criminal contempt for failure to comply with an Order of this Court.

It is further ORDERED that a copy of this Order shall be forwarded to the Chief Judge of the United States District Court for Southern District of Texas for appropriate proceedings pursuant to the Disciplinary Rules of this Court.

SIGNED at Houston, Texas, on this 5 day of May, 1998.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-21032

BARBRA PIOTROWSKI

Plaintiff – Appellee-Cross-Appellant

v.

CITY OF HOUSTON; ET AL

Defendants

CITY OF HOUSTON

Defendant – Appellant-Cross-Appellee

Appeals from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 7, 2001)

(Opinion 01/17/01, 5 Cir., ___, ___ F.3d ___)

Before JONES, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested

that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

The Texas Board of Private Investigators
and Private Security Agencies
INTER-OFFICE MEMORANDUM

Date: February 1, 1973

To: Thomas W. Brown, Director

From: ---------, Investigator

Subject: Dudley C. Bell and Associates Re: C-258
Information on the named subject

At this time a Houston Harris County Grand Jury has asked for and received 90 more days to probe the Houston Fire Department. A source close to this Grand Jury and the investigation state that BELL would probably be indicted the exact charge unknown to him.

It allegedly has something to do with the arson investigation of the burning of THE DADDY RABBIT CLUB at 1600 Post Oak in Houston. City of Houston Arson investigators BOB SHOWQUIST AND ROBERT SCHOWLOCK made an investigation of the fire and received warrants for DUDLEY C. BELL, JR. and arrested the subject. When they checked in on the radio they were commanded to report to the Houston Fire Department to the office of CHIEF ARSON INVESTIGATOR MANOS. Upon arrival at that location they met with both MANOS AND Houston Fire Chief C.R. Cook. In the closed meeting COOK consulted with MAYOR LOUIE WELCH on the telephone and then adviset [sic] the investigators that they would lose all retirement benefits and their jobs if they didn't forget this investigation and the fact that BELL had anything to do with it. The warrants and

reports were turned over to the Chief and they left the room.

In the meantime BELL started following U.S. Treasure [sic] agent Richard Brooks and -------- started to investigate BELL. In his investigation he discovered that BELL AND COOK are part owners of the night club named EL COCO LOCO ------- in the 2800 of Milam in Houston.

------- ago when the grand jury investigation was going strong on the Fire Department they sent some trucks to Nicaragua on a mercy mission the Chief of the Houston Fire Department asked his friend DUDLEY C. BELL JR. to go along as a driver and cook for this trip. It is believed that he did it for two reasons and they are the investigation and to help this case in Federal court when it comes to trial in March.

---signature-----
Investigator Agent --

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BARBARA PIOTROWSKI	*	CV-H-95-4046
	*	Houston, Texas
VS.	*	January 8, 1998
CITY OF HOUSTON	*	10:12 a.m.
	*	

VOLUME IV

Doc. 133

BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE

p. 1

Document No. 133, p. 64. Testimony of Rick Waring.

[497] Q. Okay. Do you have – was there an incident in which you were arrested along with Mr. Bell for a potential arson case at Daddy Rabbits?

A. (Rick Waring) Well, Daddy Rabbits was a club over off of Post Oak. Back before, I bet, there wasn't three clubs in Houston. So [498 (65)] Dudley got in an argument with somebody at a pool table, and they tried to throw him out. And he tried throwing a punch over my shoulder, and he was in back of me; and the guy was in front of me. He tried to throw a punch. And so the guy says, "Y'all get out." So I drug Dudley out, but I kind of got a big shock. Dudley went to his Cadillac opened the trunk up and took out a keg of powder, black powder, about so big. About this – I never even seen one of these things before. I said, "Gees," I never seen anybody do this. So he proceeded to start – and the whole front of this

club was glass – so he proceeded to pour a line right up to the front door. And then I said, "Dudley, that's it. I'm leaving."

You know this is ridiculous, I mean, a 150 people watching us. And so he says, "Do what you want."

I got in his car. And as I was getting in his car, I saw him lighting this powder. And it went up to the door, and that was it.

Q. Did it explode?

A. No, no. It just made – like, somebody breaks a firecracker and lights the powder out of the firecracker. So then I was driving down the road, you know, I said, "That's fine. He can walk or do whatever he wants." And I was converged on by about 30 police officers. They took me to jail, kept me overnight, turned me lose [sic] the next morning.

[499 (66)] And he said, "Sorry, it was a mistake."

Q. And did you have any knowledge of anything else of how and why – neither – or Dudley Bell – how or why Dudley Bell was never convicted of that crime or that attempted arson?

A. Actually, I really didn't know any of the people, but I knew Dudley had some stroke. He would – he knew people and he could do things. He had a badge. And he was –

THE COURT: What kind of a badge?

MS. SCHLOSSER: Your Honor, going to object.

THE COURT: Overruled.

What kind of badge?

THE WITNESS: I only saw it a few times, and he didn't put it in my face. When we'd get stopped by the police or something, he'd throw this badge up to them; and they'd say, "Okay." So I really –

* * *

Doc. 133, p. 136. Testimony of Officer Liles.

* * *

[569] A. (By Officer Liles) He [Rick Waring] told me that Dudley Bell was shopping a contract to have Barbara Piotrowski killed.

Q. All right. Did – from there, was there a – an in person meeting or was there a phone call, or what do you recall?

A. At that time it was just a phone call.

Q. All right. Did he tell you anymore of the details of this contract that was being shopped?

A. Well, he obviously told me details. Because I made report on it.

Q. Did he – did he say what was to occur or what was to happen with her body after she was shot?

A. Yes, sir. He said Dudley wanted her chopped up and dumped in the ocean.

Q. All right. And did you, from your knowledge of and association with Dudley Bell, believe him a person capable of committing an act like this?

A. You bet you.

* * *